

# HISTORY, JURISDICTION, AND THE FEDERAL COURTS: CHANGING CONTEXTS, SELECTIVE MEMORIES, AND LIMITED IMAGINATION

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## I. INTRODUCTION

A good deal of discussion, from a variety of vantage points, addresses the need to “reform” (a word translated in a myriad of ways) the federal courts. But commonplace predicates in this discussion are problematic because many of them fail to take into account how much the context has changed.

First, the often-invoked description of the federal courts as comprised of a three-tiered pyramid of courts fails to capture the sprawling structure into which the federal judicial system, consisting of courts, agencies, and private-affiliated decision makers, has evolved. Second, that description does not comprehend the large-scale, aggregate litigations to which judges now have to respond. Third, the nature of the decision making process itself has been altered; the pretrial phase at the trial level has taken on greater importance, and alternative dispute resolution has become a part of both trial and appellate court processes. A fourth difficulty is that the premise of state and federal courts as bounded and distinct is being undermined in practice; judges and lawyers are inventing ways to join the systems together under the rubric of what is now termed judicial federalism. Yet another limit comes from lacunae about information on current use of the federal courts.

But so often have traditions been rehearsed — of the three-tiered federal pyramid (constructed by the way only a hundred years ago<sup>1</sup>),

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1. The original structure of 1789 provided that Supreme Court justices joined district judges in sitting as appellate courts; no right of appeal attached in all instances. The creation of a separate intermediate appellate court between trial and Supreme Court and of a right of appellate review occurred by a series of enactments from 1891 to 1925. *See* Act of March 3, 1891 (Evarts Act), ch. 517, 26 Stat. 826 (establishing circuit courts of appeal and appointing additional circuit judges but continuing the *nisi prius* jurisdiction of those courts); Act of March 3, 1911, ch. 231, 36 Stat. 1087 (abolishing circuit courts and transferring their jurisdiction to the district courts); Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (Judges Bill) (requiring the use of intermediate appellate judges and establishing generally discretionary review at the Supreme Court level). *See generally* FELIX FRANKFURTER &

of only life tenured federal judges, of bipolar litigation, of trials as central, and of discrete and territorially-bounded roles for the state and federal system — that the description persists despite the changing realities.<sup>2</sup>

The purpose of this essay, and of the ongoing project of which it is a part,<sup>3</sup> is to help reframe current discussions of “the federal courts” in the hopes of altering contemporary arrangements and the imagined future of adjudicatory activities within the United States. Below I specify how descriptions of federal courts miss a good deal of today’s function and practice. Thereafter, I analyze allocations of jurisdictional authority between state and federal courts as proposed by a 1995 “Long Range Plan” from a federal judicial committee.<sup>4</sup> The underlying premise of long range planning is that dramatic changes do and could further undermine the ability of the federal courts to function. Yet the 1995 Proposed Plan’s recommendations reiterate familiar themes, evidencing a preservationist commitment to maintaining the special status that the life tenured judiciary has enjoyed.

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JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT, A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 103-145 (1928).

2. In some respects, courts have come to resemble what Morton Grodzins described as the “chaotic” structure of United States government. MORTON GRODZINS, *THE AMERICAN SYSTEM* 3-4 (Daniel J. Elazar ed., 1966) (not only describing the “multitude of governments” but also that “[t]here is no neat division of functions among them”).

3. See Judith Resnik, *Rereading “The Federal Courts”: Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021 (1994) [hereinafter Resnik, *Rereading “The Federal Courts”*]; Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences of Settlement and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994) [hereinafter Resnik, *Whose Judgment?*]; Judith Resnik, *From “Cases” to “Litigation,”* LAW & CONTEMP. PROBS., Summer 1991, at 5 [hereinafter Resnik, *From “Cases” to “Litigation”*]; Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909 (1990) [hereinafter Resnik, *Housekeeping*]; Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989) [hereinafter Resnik, *Dependent Sovereigns*].

4. See COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, *PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS* (March, 1995) [hereinafter 1995 PROPOSED LONG RANGE PLAN]; see also COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, *PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS* 18 (Nov. 1, 1994) (draft for public comment) [hereinafter 1994 DRAFT PROPOSED LONG RANGE PLAN]. As of this writing (the fall of 1995), a final version of the plan is to be published this winter.

An animating assumption of the Long Range Plan is that what has been within the jurisdictional preserve of the state courts should not, absent special justification, become a matter for federal court jurisdiction. At the same time, the planners propose de-accessing parts of what has been within federal jurisdictional terrain. In their explanations, the planners often claim that jurisdictional history supports their proposals. But their reliance on historical practices as guides to the future of federal jurisdiction is problematic, in part because the jurisdictional history is itself varied and complex, and in part because one way to view that history is that it supports federal expansion rather than contraction.

Not surprisingly, therefore, proponents of particular visions of federal court jurisdiction disown some traditions and embrace others. For example, the Proposed Long Range Plan seeks to reduce federal jurisdiction over one longstanding category of cases — diversity — and ignores another, federal jurisdiction to enforce individual rights conferred by Congress. Missing from the planning is much by way of explanation of the normative arguments that inevitably underlie understandings of the role of a life tenured judiciary as contrasted to the many other judicial actors, including state judges, federal magistrate, bankruptcy, and administrative judges, all of whom lack life tenure but regularly render judgments.

Of course, invocation of historical practices as a basis for contemporary decision making is not without its attractions — as a means of attempting to draw principles from practice and to avoid imposition of normative judgments not anchored in shared assumptions. But given the breadth of federal jurisdictional history, it becomes difficult to use it as a limiting principal. There is no escaping the selection among historical practices, of emphasizing some and distancing oneself from others, of frankly asking why one has fixed on a particular set of practices as specially instructive for contemporary problems. The basic questions, when considering allocation among judicial actors within the United States, are questions of federalism.

My purpose here is to begin to respond to the broad issue of how theories and aspirations for federalism affect the deployment of judges. I reject what might be termed either a “categorical” or an “essentialist”

federalism approach, which ascribes to states and the federal government particular activities as intrinsically belonging to them. Political scientists have long embraced metaphors like “marble cake,”<sup>5</sup> “picket fences,”<sup>6</sup> and “matrixes”<sup>7</sup> to capture the interdependent governance of local, state, and national institutions. Lawyers and judges have been slower to see the webs and connections that make problematic claims of *a priori* distinctive functions of the various levels of government and their courts.

Under my “non-categorical” approach, discussion of federal and state jurisdiction acknowledges the variety of jurisdictional arrangements that lace United States history and appreciates the necessarily fluid and changing understandings of federal and state boundaries. Whatever the mandates of either court system, one should see the potential for their transient quality, that neither federal nor state jurisdiction need be what it has or has not been before.

Further, by pushing current developments of judicial federalism to the fore, and focusing on the interdependent court systems in which state and federal judges work together on litigation that sprawls across jurisdictions, the possibilities of other arrangements among court actors become conceivable. To give one illustration of where a non-categorical analysis might lead, I suggest consideration of a set of courts that are neither state nor federal but have authority over disputes that involve litigants of more than one state. Such *national* courts (as contrasted with *federal* courts) would join other institutions that are national associations of state-based actors and that reflect the increasingly common phenomenon of inevitably overlapping work among actors empowered by municipal, state, tribal and/or federal governments.<sup>8</sup>

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5. GRODZINS, *supra* note 2.

6. Deil S. Wright, *Revenue Sharing and Structural Features of Federalism*, 419 ANNALS 100, 109-10 (1975) [hereinafter Wright, *Revenue Sharing*].

7. DANIEL J. ELAZER, *EXPLORING FEDERALISM* 37, 200 (1987).

8. See, for example, the National Conference of Commissioners on Uniform State Laws, the National Conference of State Legislators, the National Association of Attorneys General, the National League of Cities, the National Governors' Association, and the United States Conference of Mayors, discussed *infra* notes 321-27 and accompanying text.

I do not advance this proposal as the ultimate answer to issues of federalism; I do not believe any such answer exists or that relationships among the participants in United States federalism will remain static. What I do believe is that, whether by the creation of inter-state, non-federal courts or by other means, it is time to depart from the history of dichotomous alternatives (of either state or federal courts) and of essentialized images (of both state and federal courts) and to imagine new institutional arrangements that embody the interdependence of judicial actors and that serve the adjudicatory needs of the participants in the many systems of justice within the United States.

## II. THE PERENNIAL TOPIC: FEDERAL JUDICIAL AUTHORITY

Federal jurisdiction is once again a "hot" topic. Conversation — both popular and scholarly — has been prompted by several events of which I will flag just a few. On the criminal side, Congress has extended federal jurisdiction to embrace crimes such as "carjacking"<sup>9</sup> and gun possession by juveniles.<sup>10</sup> Further, by increasing penalties for a variety of drug-related offenses,<sup>11</sup> Congress has created incentives for federal and state prosecutors to seek federal indictments.<sup>12</sup> Federal

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9. Anti Car Theft Act of 1992, Pub. L. No. 102-519, § 101(b), 106 Stat. 3384 (current version at 18 U.S.C. § 2119 (1994)).

10. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110201, 108 Stat. 1796, 2010 (codified at 18 U.S.C. § 922(x)(2) (1994)); see also Michael deCourcy Hinds, *Bush Aides Push State Gun Cases into U.S. Courts*, N.Y. TIMES, May 17, 1991, at A1.

11. Penalties for the distribution, sale, and manufacturing of drugs have increased substantially over the last few decades. Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970, under which first time offenders convicted of distribution, sale, or manufacturing of Schedule I or II narcotics faced a maximum sentence of 15 years and a maximum fine of \$25,000; there was no mandatory minimum sentence. Pub. L. No. 91-513, § 401(b)(1)(A), 84 Stat. 1236, 1261. After Congress enacted the Narcotics Penalties and Enforcement Act of 1986, such an offender faced a sentence range of a minimum of ten years to life, and fines of up to \$4,000,000. Narcotics Penalties and Enforcement Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207-2 (current version at 21 U.S.C. § 841(b)(1)(A) (1994)).

12. See Dennis E. Curtis, *Congressional Powers and Federal Judicial Burdens*, 46 HASTINGS L.J. 1019 (1995), and the Symposium, *Federalization of Crime: The Roles of the Federal and State Governments in the Criminal Justice System*, 46 HASTINGS L.J. 965 (1995).

judges report a docket skewed by what they believe to be a surplus of criminal cases,<sup>13</sup> and bemoan what has come to be called the “federalization of crime.”<sup>14</sup> The United States Supreme Court has recently held one such grant of jurisdiction unconstitutional.<sup>15</sup>

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13. Scholars debate the impact of the recent wave of filings; whether the percentage of criminal cases nationwide has increased depends upon the benchmark used. Compare Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1031, 1040 (1995) (reporting skepticism about docket overload and commenting that, while federal “criminal case filings have fluctuated over time,” they have “remained basically steady for sixty years”) with Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 983 (1995) (arguing that an “explosion of new federal criminal statutes” has imposed a cost and that the “increasing criminal caseload threatens to impair the quality of . . . justice”).

Professor Little relied on the number of criminal cases per judge, the increased role in criminal cases of federal magistrate judges who augment the workforce of the federal courts, and geographic differences in terms of effects of criminal filings to conclude that “it is simply a myth that federal criminal case filings have skyrocketed.” However, he believed that the “character” of the cases, in which prosecutions have “shifted dramatically toward larger numbers of narcotics and weapons offenses,” had changed. Little, *supra*, at 1043. Professor Beale disagreed, claiming that the “real impact of the criminal docket” is the proportion of judicial resources that criminal cases take rather than their absolute numbers. Beale shared with Little a view that the nature of the cases have changed as well. Beale, *supra*, at 984.

As of 1994, after a prior decade of growth, both the number of criminal filings and the number of criminal defendants declined in 1994 and 1993. Filings per judgeship also declined to about 70 per life tenured judge. Yet the length of trials by jury and the number of multi-defendant cases has increased in recent years. 1994 REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 9-11 (1994) [hereinafter 1994 AO REPORT]. For further discussion of the effects of changes in the criminal docket, see David L. Cook, Steven R. Schlesinger, Thomas J. Bak & William T. Rule, II, *Criminal CaseLoad in U.S. District Courts: More Than Meets the Eye*, 44 AM. U. L. REV. 1579 (1995) (arguing that the changing nature of the caseload is underappreciated when only filings are considered); Terence Dunworth & Charles D. Weisselberg, *Felony Cases and the Federal Courts: The Guidelines Experience*, 66 S. CAL. L. REV. 99, 131, 133 (1992) (analyzing criminal trial rates by kind of offense and filings by districts). For discussion of judicial perceptions of particular kinds of cases as burdensome, see Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 951-62 (1984).

14. See generally WILLIAM W. SCHWARZER & RUSSELL R. WHEELER, ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE (FJC, 1994) (summarizing arguments for and against “federalization”).

15. *United States v. Lopez*, 115 S. Ct. 1624 (1995) (invalidating the provision making it a federal crime to have a gun within 1000 feet of a school yard), discussed *infra* notes 260-72 and accompanying text.

On the civil side, the nature of the federal docket and the tasks of federal judges have also changed in recent years. One highly visible pocket of litigation comes from lawsuits involving thousands of claims about products such as asbestos and breast implants; these lawsuits prompt questions about how to handle a myriad of interrelated civil complaints, numbering from the tens of thousands to millions.<sup>16</sup>

Atop a changing docket, the federal judicial mandate has also been revised. In 1990, Congress charged the judiciary with developing "civil justice reform" to speed decision making and to lessen its expense; Congress urged judges to rely on managerial modes and alternative dispute resolution in such efforts.<sup>17</sup> The 1994 Congress created new causes of action, such as protection for persons injured by a "crime of violence motivated by gender"<sup>18</sup> and for persons seeking to use clinics providing reproductive services including abortions.<sup>19</sup> The more recently elected 1995 Congress has before it yet other agendas. One effort would change the status of federally-funded assistance programs to make current "entitlements" discretionary and thus divest recipients of rights enforceable in federal court.<sup>20</sup> Other proposed legislation, the

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16. See *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 416 (J.P.M.L. 1991) (then over 26,000 federal cases); *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 261 (E.D. Pa. 1994) (involving "future" asbestos claims, estimated to be in the "tens of thousands"); *In re Silicone Gel Breast Implant Prods. Liab. Litig.* (Lindsey v. Dow Corning Corp.) (MDL 926), No. CV94-P-11558-S, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994) (involving claims about the safety of more than 2 million breast implants and the viability of a proposed settlement in light of the bankruptcy of one of the defendants); see also Milo Geyelin & Timothy D. Schellhardt, *Dow Corning Seeks Chapter 11: Shield Clouding Status of Breast-Implant Pact*, WALL ST. J., May 16, 1995, at A3.

17. The Civil Justice Reform Act of 1990, Pub. L. No. 101-650, Tit. I, 104 Stat. 50 89 (codified at 28 U.S.C. §§ 471-482 (1994)).

18. The Violence Against Women Act of 1994, Pub. L. No. 103-122, § 40302, 108 Stat. 1902, 1941 (codified at 42 U.S.C.A. § 13981(c) (West Supp. 1995)).

19. The Freedom of Access to Clinic Entrances Act of 1994 punishes any person who, "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services," and creates a civil cause of action for any person so injured, including compensatory and punitive damages, or an alternative fixed damages amount of \$5,000. Pub. L. No. 103-259, 108 Stat. 694 (codified at 18 U.S.C. §§ 248(a)(1), 248(c)(1)(A)-(B) (1994)).

20. Welfare Transformation Act of 1995, H.R. 4, § 302, 104th Cong., 1st Sess.



“Common Sense Legal Act,”<sup>21</sup> seeks to curb litigation and alter rules on legal fees, including requiring losers to pay winners in some instances.<sup>22</sup>

Not surprisingly, the federal judiciary has also sought to articulate a comprehensive view of the shape of its own work. The Judicial Conference of the United States commissioned a project of “long range planning” in an effort to set goals for the federal courts.<sup>23</sup> This work represents an important initiative by the federal judiciary — contemplating the changing demands made on the federal courts and considering how to formulate structural responses. In November of 1994, the federal judiciary’s Long Range Planning Committee issued a draft report that described its “nightmarish” picture of rising numbers of federal cases and overburdened federal judges and set forth responses.<sup>24</sup> After soliciting comments and holding hearings,<sup>25</sup> the

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(Version 3, March 30, 1995).

21. H.R. 10, 104th Cong., 1st Sess. (1995), and H.R. 956, 104th Cong., 1st Sess. (1995).

22. H.R. 10, § 101 (version 4, Feb. 13, 1995) (proposing to amend 28 U.S.C. § 1332 to require losers to pay winners’ reasonable attorneys fees not to exceed the amount of the loser’s fees, or a reasonable fee if the loser is on a contingency fee arrangement).

23. See 1995 PROPOSED LONG RANGE PLAN, *supra* note 4; 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4. This project is the second recent effort to contemplate the future of the federal courts. In 1988 Congress chartered the Federal Courts Study Committee to “make a complete study of the courts of the United States” and “to develop a long-range plan for the judicial system.” Federal Courts Study Act, Pub. L. No. 100-702, 102 Stat. 4644-45 (1988) (current version at 28 U.S.C. § 331 note (1994)). In 1990 that group issued its report, which shared many assumptions with that of the Long Range Plan and which included some proposals similar to those of the Long Range Plan. Both reports also called for ongoing mechanisms for planning itself. See JUDICIAL CONFERENCE OF THE UNITED STATES, FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 146-48 (Apr. 2, 1990) [hereinafter FEDERAL COURTS STUDY COMMITTEE REPORT]; 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 135-36; 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 114-15.

Several jurists have also considered the scope of federal court jurisdiction and urged modifications. See, e.g., HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW*, 1-14, 197-98 (1973) (describing both a “minimal” and “maximum” model of jurisdiction and arguing for the curtailment of certain jurisdictional provisions to enable the federal courts to do the “great work for which they are uniquely equipped”) [hereinafter FRIENDLY, *FEDERAL JURISDICTION*]; RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985) (arguing that a crisis of volume requires substantially limiting the federal courts’ jurisdiction) [hereinafter POSNER, *THE FEDERAL COURTS*].

24. 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 16. See Robert Pear,

Committee presented a revised report in March of 1995 to the Judicial Conference of the United States.<sup>26</sup>

Although not all federal judges agree with the Long Range Plan,<sup>27</sup> the draft and the revised monograph provide a distillation of

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*Judges Proposing to Narrow Access to Federal Court*, N.Y. TIMES, Dec. 5, 1994, at A1.

25. In December of 1994, the Long Range Planning Committee held public hearings in Phoenix, Chicago, and Washington D.C., and received written commentary; I testified at the Washington hearings. See Testimony of Professor Judith Resnik (submitted Dec. 9, 1994) (on file with the author); see also Judith Resnik, *National Courts: Imagining Alternatives to State and Federal Courts*, USC LAW, Spring 1995, at 2 (magazine of the University of Southern California Law Center); and in Judith Resnik, *To Handle the Overload, Create a National Court*, NAT'L L.J. Jan. 30, 1995, A21, A23. The Department of Justice filed comments in January of 1995, and opposed the Plan's insistence on attempting to limit federal court jurisdiction. See Comments of the Department of Justice on the Proposed Long Range Plan for the Federal Courts at 2-6, 9-10 (Jan. 14, 1995) (on file with the author).

26. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at vii. The Judicial Conference "approved" the recommendations of the plan, subject to members of the Judicial Conference delaying adoption of any particular recommendation by requesting prior to April 11, 1995 that such proposals be sent to committees of the Conference for "further study and report to the September 1995 Judicial Conference." Letter "To All Interested Parties," from L. Ralph Mecham, in his capacity as Secretary to the Judicial Conference of the United States (March 15, 1995). By that procedure, almost a half of the 101 recommendations were identified for "further study," including many relating to the scope of federal jurisdiction, both civil and criminal, the role of bankruptcy and magistrate judges, and changes at the appellate level. See Action Notice, 60 Fed. Reg. 30,317 (June 8, 1995) [hereinafter Action Notice]. In my discussion hereafter of specific proposals, I will note whether they have been deferred pursuant to this process or have been, as of June 8, 1995, approved, effective April 12, 1995. See Action Notice, *supra*; 1995 PROPOSED LONG RANGE PLAN, *supra* note 4.

In September of 1995, a third document relating to the Long Range Plan was published; the Judicial Conference provided a list of recommendations that were approved, as modified, with proposed methods of implementation. That listing included 93 recommendations (some of which have numbers different than those in the March, 1995 plan), and about half of the recommendations are accompanied by an asterisk, indicating changes made by the Judicial Conference from the text submitted by the Long Range Plan. See JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS: PLAN RECOMMENDATIONS AND IMPLEMENTATION STRATEGIES (September 1995). Some of the proposed March Recommendations were not accepted in September; this essay, however, describes the reports as of the spring of 1995.

27. See, e.g., Statement of the Honorable Stephen Reinhardt (submitted Dec 7, 1994) (criticizing the Committee's efforts to limit federal rights enforcement rather than to design means by which to respond to the needs for national law enforcement) (on file with the author) [hereinafter Reinhardt Statement]; Statement of the Honorable Joseph F. Weis, Jr. (submitted Dec. 9, 1994) (agreeing with many of the proposals and urging that the Committee expand district court authority to review appeals from federal agency adjudication) (on

what many federal judges believe should be the role of the federal courts. While ever-conscious of Congress' constitutional mandate to shape federal jurisdictional boundaries,<sup>28</sup> the plan puts forth arguments about why other branches of the federal government should constrain their aspirations for federal judicial work.

A central premise of the Long Range Plan is that the federal courts — “national courts of limited jurisdiction operating within a system of federalism” — are distinct from other judicial institutions in the United States and that such distinctions should be maintained.<sup>29</sup> The plan ascribes to the federal judiciary the “core values”<sup>30</sup> of the “rule

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file with the author) [hereinafter Weis Statement]; Statement of the Honorable Jon O. Newman (submitted Dec. 9, 1994) (agreeing with much of the approach but arguing that further limits be placed on access to the federal courts by authorizing “discretionary access,” the ability of judges to exercise discretion to decline to hear particular civil cases) (on file with the author) [hereinafter Newman Statement]; see also Action Notice, *supra* note 26 (conference members called for additional study of various recommendations).

28. See 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 2 (“Congress sets the courts’ budgets and the scope of federal jurisdiction . . . .”); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 15, at 1 (“Congress controls the courts’ budgets and the scope of federal jurisdiction . . . .”). A similar note was struck by the Chief Justice in his 1994 year-end report. See *Chief Justice Rehnquist Reflects on 1994 in Year-End Report*, THIRD BRANCH, Jan. 1995, at 1, 2 (Congress creates the federal courts except the Supreme Court, sets the jurisdiction, determines the substantive law to be applied, regulates procedure, and appropriates money, but judicial commentary is appropriate on “wages, hours, and working conditions,” as well as on procedural rules, consequences of reform, sentencing, and jurisdictional assignments). For further discussion of the dialogue between the federal judiciary and Congress, see Symposium, *Federal Judicial Independence*, 46 MERCER L. REV. 637 (1995).

Both scholars and case law debate the actual boundaries set by Article III, § 2. See generally Lawrence G. Sager, *Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985).

29. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 6 (“Federal courts have served the nation well because they are special purpose courts, designed and equipped to adjudicate small numbers of disputes involving important national interests”; the “mission” includes “a commitment to conserving the federal courts as a distinctive judicial forum of limited jurisdiction . . . leaving to the state courts the responsibility for adjudicating matters that, in the light of history and a sound division of authority, rightfully belong there.”); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 4 (same).

30. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 5 (chapter entitled

of law,” “equal justice,” “judicial independence,” “excellence,” and “accountability.”<sup>31</sup> The plan also discusses aspirations for the provision of equal, affordable, and accessible justice.<sup>32</sup>

According to the Long Range Plan, a central problem is that the federal courts have a large caseload with more in store.<sup>33</sup> The planners see the federal judiciary as in need of protection to accomplish its tasks; that, while the size of the federal judiciary might grow a bit, expansion from the approximately 830 life tenured judges to 4,000 is, in their view, highly undesirable.<sup>34</sup> The Long Range Plan presents an overall picture of too many cases,<sup>35</sup> too much need for judgment, too

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“Conserving Core Values, Yet Preserving Flexibility”); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 3 (same title).

31. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 7-8; 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 5-6 (same except that proposed draft did not discuss the “rule of law”).

32. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 103-04; 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 87 (discussed in both drafts in chapters entitled “The Federal Courts and Society”).

33. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 9-15; 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 7-13.

34. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 18-19; 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 16. For a view that such an approach is deeply misguided and that the only way to “preserve the fundamental purposes and functions” of the federal judiciary is to expand it, see Reinhardt Statement, *supra* note 27, at 2.

35. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 9-15, 18-20; 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 11-13, 16-18. Both documents rely on projections on case filings. Projecting litigation rates, which are affected by a host of variables from the numbers and methods of payment of lawyers, congressional enactment of legislation, to the commencement of wars, is a difficult activity; projections vary considerably depending upon the assumptions of a given model.

Appendix A to both the 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 137-50, and to the 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 117-29, sets forth the assumptions used by the planners. At hearings on that draft, criticism was voiced about such projections. See Statement of Leonard S. Rubenstein, Director of the Judge David Bazelon Center for Mental Health, Hearing before the Long Range Planning Committee at 10-12, and Appendix (Dec. 9, 1994) (on file with the author) [hereinafter Rubenstein Statement]. Rubenstein described the social security litigation of the 1980s, in which the federal caseload tripled from 10,000 to 30,000 cases in a short time frame. After a series of decisions by the federal courts, the executive changed aspects of handling social security cases, and the social security litigation diminished. As of 1990, Social Security Act cases were at a 15 year low, of fewer than 7,500 cases. *Id.* For additional criticism of the Administrative Office caseload predictions, see Statement of John Frank, Hearing before the

few judges, and a Congress too actively imposing work on federal judges.

While one response to such caseload burdens would be to increase the number of life tenured judges, that route was rejected.<sup>36</sup> Instead, the Long Range Planning Committee proposes redirecting those in quest of judgment to other sources. The Plan urges that Congress revisit federal jurisdictional grants in two directions: first, to shift some authority from federal courts to state courts and/or to restrict current expansion of federal civil and criminal jurisdiction,<sup>37</sup> and second, to enlarge the jurisdictional grants to federal agencies and thereby to move cases from federal courts to federal agencies.<sup>38</sup> For example, one proposal reiterates a long-standing suggestion by members of the federal judiciary<sup>39</sup> to curb diversity jurisdiction. The Plan urges

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Committee of the Judicial Conference on Long-Range Planning at 1-3 (Phoenix, Ariz, Dec. 7, 1994) (on file with the author) [hereinafter Frank Statement]. The problems of prediction itself are noted in FEDERAL COURTS STUDY COMMITTEE REPORT, *supra* note 23, at 9.

36. The Plan supported something it termed "carefully controlled" growth, explained as "tread[ing] a middle path that rejects unlimited expansion yet avoids a policy of zero growth." 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 38 (Recommendation 16); Action Notice, *supra* note 26 (deferred); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 31-32 (same recommendation).

37. See 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 23-32, 34-37 (Recommendations 1-4, 6-8, 12, 15); Action Notice, *supra* note 26 (deferred); see also 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 20-27, 29-30 (Recommendations 1-3, 5-7, 11). The plans express distress specifically about "federalization" of criminal law. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 23-27 (Recommendations 2-5); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 20-23 (Recommendations 1-4).

38. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 32-34 (Recommendations 9-10); Action Notice, *supra* note 26 (deferred); see also 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 27-28 (Recommendations 8 and 9).

39. See FRIENDLY, FEDERAL JURISDICTION, *supra* note 23, at 139-52; Wilfred Feinberg, *Is Diversity Jurisdiction an Idea Whose Time Has Passed?*, N.Y. ST. B.J., July 1989, at 14, 16 (arguing that it is "unjustifiable" to continue diversity jurisdiction in light of other caseload pressures in the federal courts); Dolores K. Sloviter, *Diversity Jurisdiction Through the Lens of Federalism*, 76 JUDICATURE 90 (1992) (criticizing diversity litigation because of the "inevitable erosion" of state law); Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671 (1992) [hereinafter Sloviter, *Diversity Jurisdiction Through the Lens of Federalism*]; see also Conference Supports Repeal of In-State Plaintiff Diversity Jurisdiction, THIRD BRANCH, June 1994, at 4 (describing endorsement by Judicial Conference of the United States of limitations on diversity jurisdiction); Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 234-40 (1948) (calling for limits on diversity

Congress to turn over to the state courts much of the diversity docket<sup>40</sup> (about 50,000 cases or about a quarter of the current federal civil docket<sup>41</sup>).

Turning to changes from within the judiciary and, again, in search of means to fulfill the core purposes of federal adjudication,<sup>42</sup> the report suggests that federal courts increase their reliance on alternative dispute resolution,<sup>43</sup> renew managerial efforts to process cases more economically,<sup>44</sup> and delegate more to magistrate and bankruptcy

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jurisdiction); Henry Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 510 (1928) (calling for a reexamination of diversity jurisdiction and arguing that pressures from "distinctively federal litigation may call for relief of business that intrinsically belongs to the state courts").

The bases for support for diversity are ably put forth by John Frank. See John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. LEGIS. 403 (1979) [hereinafter Frank, *The Case for Diversity Jurisdiction*]; John P. Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7 (1963) [hereinafter Frank, *For Maintaining Diversity Jurisdiction*].

40. The 1995 Proposed Plan recommended that Congress retain diversity cases for certain kinds of cases, such as large-scale mass torts. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 29 (Recommendation 7; either abolishing diversity except for "actions involving aliens, interpleader actions, and cases in which the petitioner can clearly demonstrate the need for a federal forum," as well as for "some consolidated 'mass tort' litigation;" or alternatively eliminating in-state plaintiff diversity, increasing the amount in controversy and other modifications); Action Notice, *supra* note 26 (deferred); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 25-26 (same).

This proposal resembles that of the Federal Courts Study Committee. FEDERAL COURTS STUDY COMMITTEE REPORT, *supra* note 23, at 38-43 (recommendation to limit diversity jurisdiction to "complex multi-state litigation, interpleader, and suits involving aliens"), 44-47 (recommendations to expand the scope of multidistrict litigation, provide further guidelines for consolidation, and to "analyze . . . tailored procedures to avoid undue relitigation of pertinent issues" in "the small number of instances in which extraordinarily high numbers of injuries may have been caused by a single product or event").

41. 1994 AO REPORT, *supra* note 13, at A-24 (Table C-2; U.S. District Courts — Civil Cases Commenced by Basis of Jurisdiction) (In 1993-94 year, 229,850 civil cases were commenced, of which 54,886 or 24 percent were diversity cases).

42. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 5-9; 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 5-13.

43. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 65-66 (Recommendation 41); Action Notice, *supra* note 26 (approved); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 53 (Recommendation 38) (similar).

44. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 61-66. Included are suggestions for trial courts and appellate courts. *Id.* at 65-66 (Recommendations 40-41; including encouraging use of ADR programs); *id.* at 62-65 (Recommendations No. 37-39, 39a-39e; including greater exchange of information among circuits and use of civil appeals

judges.<sup>45</sup> The Plan also raises concern about the need to make justice “fully accessible to individuals with disabilities”<sup>46</sup> and about the importance of serving the increasingly diverse population of litigants, lawyers, and staff now within the courts.<sup>47</sup>

During the period of notice and comment on the Long Range Plan, many dissenters emerged.<sup>48</sup> Among the various concerns

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management programs); Action Notice, *supra* note 26 (approved); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4 (similar recommendations were made at 50-53).

45. See 1995 PROPOSED LONG RANGE PLAN, *supra* note 4. Recommendations about magistrate judges can be found at 46-47 (Recommendation 24; if parties have consented to disposition by a magistrate judge, “judgments entered in such actions should be reviewable only in the courts of appeals, and not by a district judge”), and at 93-94, 77-78 (Recommendation 67, 68, and 52(c); calling for magistrate judges to “perform judicial duties to the extent constitutionally permissible,” to be “vested with a limited contempt power,” and to participate in judicial governance).

Recommendations on bankruptcy judges can be found at 49-50, (Recommendation 28; encouraging Congress to “clarify” bankruptcy judge authority and by legislation to “recognize[] the civil contempt power of bankruptcy judges” and encouraging district courts to permit bankruptcy judges to exercise all jurisdiction “constitutionally and statutorily permissible”), at 50 (Recommendation 29; if constitutional limits make bankruptcy courts inefficient, then “the question of whether some or all bankruptcy judgeships should have Article III status should be considered”), and at 77-79 (Recommendation 52(c) suggests including one bankruptcy judge in the Judicial Conference).

All of these recommendations were deferred for further study. Action Notice, *supra* note 26. Similar proposals were included in the 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 64, 77-78 (Recommendations 49(c), 64-65; on magistrate judges), and at 41-42, 64 (Recommendation 26-27, 49(c); on bankruptcy judges).

One other tier of non-Article III judges is discussed in the report; when considering alternatives, should the volume of cases go up and other remedies not be pursued, the Long Range planners also mention “expanding the role of adjunct judicial officers (e.g., appellate commissioners).” 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 123.

46. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 105-08 (Recommendation 88); Action Notice, *supra* note 26 (Recommendation 88 approved); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 91 (Recommendation 85).

47. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 104-05 (Recommendation 86; calling on federal judges to “exert strong leadership to eliminate unfairness . . . in federal courts,” and discussing the prior Judicial Conference resolutions encouraging study of “gender bias”); *id.* at 105 (Recommendation 87; “Federal judges and all court personnel should strive to understand the diverse cultural backgrounds and experiences of the parties, witnesses, and attorneys who appear before them.”); *id.* at 108 (Recommendation 89; accessibility for “those who do not speak English”); Action Notice, *supra* note 26 (approving Recommendations 86-87 and deferring Recommendation 89); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 88-91 (Recommendations 83-86; similar recommendations).

48. See Reinhardt Statement, *supra* note 27; Rubenstein Statement, *supra* note 35;

expressed, I focus here on state judges who oppose the proposal to shift more cases to them.<sup>49</sup> Federal nightmares pale when contrasted with state court terrors, many of which come in full daylight.<sup>50</sup> A 1992 American Bar Association survey, *Saving our System: A National Overview of the Crisis in America's System of Justice*, described eight states that had closed their civil jury system for all or part of the year, fifteen that had laid off personnel, and ten that had unacceptable delays in decision making.<sup>51</sup>

When one turns to the other venue — federal agencies — proposed by the Long Range Planning Committee to take additional work, one finds a similar picture of overload. In 1994, the Equal Employment Opportunities Commission received more than 90,000 claims and had an even larger backlog.<sup>52</sup> In comparison to state and agency adjudicators, the federal judiciary occupies a place of privilege.<sup>53</sup> Yet its

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Testimony of Donald B. Ayer concerning The Proposed Long Range Plan for the Federal Courts (Dec. 9, 1994) (on file with author) [hereinafter Ayer Statement].

49. See, e.g., Judith Kaye, *Federalism Gone Wild*, N.Y. TIMES, Dec. 13, 1994, at A29 (Op Ed). Others joined in that concern. See Frank Statement, *supra* note 35, at 6 ("It is hard to be enthusiastic about relief to federal courts which further breaks down state systems").

50. See Little, *supra* note 13, at 1042.

51. AMERICAN BAR ASSOCIATION, *SAVING OUR SYSTEM: A NATIONAL OVERVIEW OF THE CRISIS IN AMERICA'S SYSTEM OF JUSTICE* 3 (1993) [hereinafter *SAVING OUR SYSTEM*]. See also 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 37 (Recommendation 14; mentioning the problems of the state courts and calling for Congress to consult "with state authorities in defining any new limits on federal jurisdiction" and to provide "federal financial and other assistance" to state judiciaries); Action Note, *supra* note 18 (Recommendation 14 deferred); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 31 (Recommendation 13; similar provision).

52. See *Lawyers Committee for Civil Rights Under Law*, 19 CIVIL RIGHTS ACT AND EEO NEWS 1 (May 8, 1995) (EEOC filings at "record levels," with 91,189 cases filed in 1994 including many alleging violations of the Americans with Disabilities Act); see also *EEOC: Declining Resources, Skyrocketing Workload*, EEOC OFFICE OF COMM. & LEGIS. AFF. at 1 (memorandum of Mar. 24, 1995; on file with the author) (backlog of 97,000 cases); Peter T. Kilborn, *Backlog of Cases is Overwhelming Jobs-Bias Agency*, N.Y. TIMES, Nov. 26, 1994, at A1 (detailing slow processing of complaints and frustration resulting); Peter T. Kilborn, *A Family Spirals Downward in Waiting for Agency to Act*, N.Y. TIMES, Feb. 11, 1995, at A1 (discussing problems faced by a family as complainant waited almost two and half years for response).

53. The Long Range planners note the problem of agencies' resources and call for Congress to improve agency adjudication. See 1995 PROPOSED LONG RANGE PLAN, *supra*



members express concern that it will soon be overwhelmed and that its ability to deliver justice services will be correspondingly eroded.

### III. THE CHALLENGES OF DESCRIPTION

Given the depressing descriptions of contemporary problems of courts, it is not surprising that “futures planning” is much the rage in both federal and state systems.<sup>54</sup> While it is appropriate to look ahead, it is also necessary to look hard at the present. In light of the difficulties of imagination and the myriad of variables that can affect the workload and agendas of the courts, I embark here on a scaled-back project — lowering my sights in one respect and expanding them in another. Instead of pressing toward the “long range,” I think we need to hone our skills at understanding what is currently happening within the federal courts and within the federal system of which they are a part.<sup>55</sup>

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note 4, at 32-33 (Recommendation 9); Action Notice, *supra* note 26 (Recommendation 9 deferred); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 27-28 (less discussion of agencies’ resource needs).

54. According to the National Center for State Courts (“NCSC”), more than a dozen states have published reports about future planning. *See* Ruth Etheredge, *NCSC, State Courts Futures Reports, Bibliography* (Jan. 6, 1994). Included are California, COMMISSION ON THE FUTURE OF THE CALIFORNIA COURTS, JUSTICE IN THE BALANCE 2020: REPORT OF THE COMMISSION ON THE FUTURE OF THE CALIFORNIA COURTS (1993); Michigan, COMMISSION ON THE COURTS IN THE 21ST CENTURY, MICHIGAN’S COURTS IN THE 21ST CENTURY: A REPORT TO THE LEGISLATURE, GOVERNOR, AND SUPREME COURT (1990); and Massachusetts, CHIEF JUSTICE’S COMMISSION ON THE FUTURE OF THE COURTS, REINVENTING JUSTICE 2022: REPORT OF THE CHIEF JUSTICE’S COMMISSION ON THE FUTURE OF THE COURTS (1992). *See generally* IRA PILCHEN & SANDRA RATCLIFF, AMERICAN JUDICATURE SOCIETY, THE FUTURE AND THE COURTS: CONDUCTING STATE COURT FUTURES ACTIVITIES (1993). Other states have commissions underway. *See, e.g.*, Delaware Legis. Serv. Senate Jt. Res. 9, 138th Gen. Assem. (Apr. 27, 1995) (continuing the Futures Commission in Delaware).

55. The difficulties of making even short-term projections is made plain by considering the time period during which the Long Range Planning Committee wrote. Before the election of 1994, Congress was assumed to be an entity that would continue to generate federal rights. Writing before that election, the judiciary’s Long Range Planning Committee made the assumption that federal entitlements were a fixture of the federal docket. By the spring of 1995, a very different Congress was at work on legislation that some might also characterize (using the phrase of the judiciary’s Long Range Planning Committee) as prompting “nightmares” — but ones different from those assumed to be frightening only six months earlier.

In an essay written in 1994,<sup>56</sup> I relied on Annette Kolodny's insightful comment (made in the context of literary criticism but apt here as well) to illustrate the difficulty of appreciating the contemporary terrain. As she put it:

We read well, and with pleasure, what we already know how to read; and what we know how to read is to a large extent dependent upon what we have already read (works from which we developed our expectations and our interpretative strategies).<sup>57</sup>

To put Kolodny's point in this context, we (who are "readers" of the federal courts) have so frequently read the map of the federal courts that it has become very difficult to see that the contours have changed. But how we describe "what is" will affect what changes we can countenance and those that we find oppressive.

Thinking about describing "what is" must also be a self-conscious activity. Several philosophical traditions remind us that the "is" of the federal courts (like the "is" of the world at large) varies considerably depending on one's perspective, point of view, experiences, and ways of framing both questions and answers.<sup>58</sup> Critical studies and postmodernism are two traditions that render problematic aspects of

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56. Resnik, *Rereading "The Federal Courts,"* *supra* note 3, at 1021.

57. Annette Kolodny, *Dancing Through the Minefield*, in *THE NEW FEMINIST CRITICISM: ESSAYS ON WOMEN, LITERATURE, AND THEORY* 144, 155 (Elaine Showalter ed., 1985) (essay originally published as Annette Kolodny, *Dancing Through the Minefield: Some Observations on the Theory, Practice and Politics of a Feminist Literary Criticism*, 6 *FEMINIST STUDIES* 1 (1980)).

58. Within the context of the federal courts, Professors Theodore Eisenberg and Stewart J. Schwab have examined the different attitudes of law professors, appellate judges, and trial judges. See Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 *U. CHI. L. REV.* 501, 503-04, 531-39 (1989).

many social empirical projects,<sup>59</sup> including mapping current or past contours of the federal adjudicatory system.

Wary thus of aspiring to a single "reading" of the contemporary federal courts, let me point to a series of changes, within the federal adjudicatory landscape, that have not been incorporated into the dominant "story" of the federal courts. Much of the contemporary commentary about the federal courts falls within the tradition of Henry Hart and Herbert Wechsler, who wrote the landmark text initially in 1953<sup>60</sup> and rely on what Kolodny termed the developed "expectations and . . . interpretative strategies"<sup>61</sup> framed in that earlier era.<sup>62</sup> Below, I outline several dimensions on which federal courts are different than they were less than fifty years ago when Hart and Wechsler wrote. Because

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59. Standpoint theorists argue that the animating assumptions of the enlightenment project of a progressive search for universal truths are misguided; some postmodernists go further and argue as well that no singular truths exist. These issues are discussed in Nancy C.M. Hartsock, *The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism*, in FEMINISM & METHODOLOGY 157 (Sandra Harding ed., 1987); SEYLA BENHABIB, JUDITH BUTLER, DRUCILLA CORNELL & NANCY FRASER, FEMINIST CONTENTIONS: A PHILOSOPHICAL EXCHANGE (1995); Sandra Harding, *Conclusion: Epistemological Questions*, in FEMINISM & METHODOLOGY 181 (Sandra Harding ed., 1987); Sara Ruddick, *Remarks on the Sexual Politics of Reason*, in WOMEN AND MORAL THEORY 237 (Eva Feder Kittay & Diana T. Meyers eds., 1987); Donna Haraway, *Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective*, 14 FEMINIST STUDIES 575 (1988).

60. HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1st ed. 1953) [hereinafter HART & WECHSLER, 1st ed.]; PAUL M. BATOR, PAUL J. MISHKIN, DAVID L. SHAPIRO & HERBERT WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. 1973); PAUL M. BATOR, DANIEL J. MELTZER, PAUL J. MISHKIN & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed. 1988) [hereinafter HART & WECHSLER, 3d ed.].

61. Kolodny, *supra* note 57, at 155.

62. Many federal courts scholars agree about the dominance of the book and its vision. See Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953 (1994) (analyzing the elements of the approach, including its focus on appropriate allocations of power and institutional responsibilities); Richard H. Fallon Jr., *Comparing Federal Courts "Paradigms,"* 12 CONST. COMMENTARY 3, 3 (1995) (discussing Hart and Wechsler's approach as the "reigning Federal Courts 'paradigm'") [hereinafter Fallon, *Comparing Federal Courts "Paradigms,"*]; Michael Wells, *Busting the Hart & Wechsler Paradigm*, 11 CONST. COMMENTARY 557 (1994-95) (arguing that the approach is no longer generative and should be replaced); Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688 (1989) (reviewing HART & WECHSLER, 3d ed., *supra* note 60, and discussing its influence and assumptions).

my initial focus will be on the federal courts, I do not detail changes in structure that have occurred over the past half century within the state court systems and in Indian tribal courts.<sup>63</sup>

*A. The Four-Tiered House with Many Add-Ons*

The number of places from which to obtain adjudication has increased. The Article III judiciary is but one of many providers of *federal* adjudicatory services. Within the federal courts themselves, two sets of non-life tenured judges — magistrate and bankruptcy judges<sup>64</sup> — now decide (sometimes initially and sometimes finally)<sup>65</sup> a growing segment of federal cases. Two descriptive statements, both important and neither made often in discussion of the federal courts, underscore this point.

First, the federal courts are no longer a three-tiered bench.<sup>66</sup>

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63. See generally Symposium *Indian Tribal Courts and Justice*, 79 JUDICATURE 107 (1995); Judith Resnik, *Multiple Sovereignties: Indian Tribes, States, and the Federal Government*, 79 JUDICATURE 118 (1995). My topic is also not about changes in other branches of government, but the obvious point should be noted: the modes of work of both congressional and executive branches has altered greatly over this century.

64. See 28 U.S.C. § 631(e) (1994) (the district judges in each district appoint full-time magistrate judges for terms of 8 years); 28 U.S.C. § 152(a)(1) (1994) (each circuit's appellate judges appoint bankruptcy judges for terms of 14 years).

65. Magistrate judges have authority to hear some pretrial matters upon designation by a district judge, to make other rulings with an opportunity for objection to the district judge, and to preside at civil trials with the consent of the parties. 28 U.S.C. § 636(b)(c) (1994). Bankruptcy judges may issue final decisions in "core proceedings" in bankruptcy but not in other cases. 28 U.S.C. § 157(b) (1994). These two sets of judges also interact; according to testimony provided to the Long Range Planning Committee by Professor Lawrence P. King on behalf of the National Bankruptcy Conference, "there is an increasing tendency among Article III district judges to refer an appeal from a final order of the bankruptcy judge to a non-Article III magistrate judge." Testimony of Professor Lawrence P. King at 2 (Dec. 9, 1994) (on file with the author).

66. Compare Beale, *supra* note 13, at 991 (reiterating and citing the Federal Courts Study Committee's discussion about the "limitations of the pyramidal three-tier system within which federal courts now operate"). As John Frank explains, although the recent edition of Charles Allan Wright's *FEDERAL COURTS* (5th ed.) excels in most respects, it too fails to appreciate fully this four-tiered structure. John P. Frank, *An Essential Guide: Wright's Law of Federal Courts*, 46 HASTINGS L.J. 285, 291 (1994) (book review of the 4th edition) (noting that "the book treats the federal courts as a three-tier system," and that "[t]his classic description is not true anymore").

Magistrate judges and bankruptcy judges are the fourth, bottom tier, sitting beneath the life tenured Article III district court judges. Second, arguing for a small number of federal judgeships, Judge Richard Posner has asserted that the current number of life tenured federal judges represents the end point of the federal courts' "natural limits of expansion."<sup>67</sup> Judge Jon O. Newman has invoked the number 1,000 as a benchmark for the appropriate size.<sup>68</sup> If the 1,000 mark is the point of toppling, the edifice has already fallen. Counting *only* life tenured, authorized, non-vacant judgeships and including those judges who have taken "senior status,"<sup>69</sup> the federal life tenured judicial strength now numbers over 1,100.<sup>70</sup>

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67. Richard A. Posner, *Coping with the Caseload: A Comment on Magistrates and Masters*, 137 U. PA. L. REV. 2215, 2216 (1989).

68. Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187, 187-88, 194 (1993) (arguing that the "line must be held at 1,000 because once that number is exceeded, it will be only a matter of time until the federal judiciary grows to 2,000, 3,000, and then 4,000" and arguing that the need for small numbers of federal judges was not tied to those judges' prestige but rather justified by the need for high-visibility decision makers and for a coherent body of law) [hereinafter Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*]; see also Gerald B. Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70, 71 (arguing that increased numbers of appellate judges would harm the courts by undermining collegiality and efficiency, and by disturbing "the clarity and stability of the law"). But see Stephen Reinhardt, *Too Few Judges, Too Many Cases*, A.B.A. J., Jan., 1993, at 52 (urging expansion of federal life tenured judiciary and arguing that quality will not be impaired). While Judge Newman is generally credited with using the 1,000 number, he subsequently stated that he was not advocating a "numerical cap" but rather the concept of sharply limited growth and the reallocation of federal judicial responsibilities to the state courts to avoid needing to increase the size of the federal judiciary. See Newman Statement, *supra* note 27, at 2-3.

69. 28 U.S.C. § 371(f) (1994).

70. According to the 1994 Administrative Office Report, the Supreme Court has 9 authorized life tenured judgeships, the federal appellate courts have 179, and the district courts have 649, for a total of 837 authorized judgeships. 1994 AO REPORT, *supra* note 13, at 25 tbl. 12. The actual number of sitting judges is both lesser and greater than the authorized positions. Judgeships go vacant for some period of time during which nominations are processed; as of 1994, 18 appellate and 60 district seats were vacant. *Id.* However, when a judge takes "senior status" that judge may continue to sit but has the option of working on a reduced basis. See 28 U.S.C. § 371(f) (1994) (mandating that senior judges be certified annually by the chief judge of that judge's circuit and carry a workload of a specified but reduced amount). In 1994, "82 senior appeals judges and 292 senior district judges were providing service." 1994 AO REPORT, *supra* note 13, at 25. Counting active and senior life tenured judges and subtracting the number of vacancies results in a workforce of 1133.

When one also includes the fourth tier (the magistrate and bankruptcy judges) *within* the federal courts, the federal judicial strength grows to more than 1,850.<sup>71</sup> The larger numbers remain at the trial level, at which work about 650 life tenured district court judges and more than an equivalent number of bankruptcy and magistrate judges appointed for terms; a total of 1,601 trial judges worked in the federal courts in 1994.<sup>72</sup> Of course, those arguing for the use of 1,000 as a benchmark count neither the more than 700 judges who lack life tenure nor the life tenured judges who have taken senior status.<sup>73</sup>

Had the United States Supreme Court charted a different path and found congressional creation of non-Article III judges unconstitutional, the Article III judiciary would have been the exclusive definition of the "federal judge," and the number of relevant "federal judges" would have remained tied to life tenure. However, the Supreme Court has repeatedly upheld the creation of non-Article III "federal judges" and,

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The Long Range Planning Committee supported the reliance on senior judges. *See* 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 88, 92-93 (Recommendations 65-66; proposing that "[t]he courts should use senior and recalled judges . . . as much as possible to achieve the goal of carefully controlled growth" and that "[j]udges should be encouraged to assume senior judge status through improvement in policies or procedures that affect senior judges"); Action Notice, *supra* note 26 (Recommendations 65-66 deferred); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 76-77 (Recommendations 62-63; similar provisions).

71. As of 1994, Congress had authorized 406 full-time magistrate judges and 326 full-time bankruptcy judges. 1994 AO REPORT, *supra* note 13, at 26-27, Tables 13 & 14. Including senior status judges and excluding the 90 vacancies reported as of 1994 in the various categories of judgeships, the federal judiciary's workforce numbered 1,866. Alternatively, if one counted authorized positions of life and non-life tenured judges but excluded senior status judges, the workforce numbered 1,560.

72. The number of working federal trial judges include the 649 authorized district court judgeships, minus the 60 vacancies, plus the 292 senior judges for a subtotal of 881. Authorized full-time magistrate and bankruptcy judgeships total 732, with 12 bankruptcy positions vacant as of 1994. 1994 AO REPORT, *supra* note 13, at 25-27, Tables 12-14.

73. The Ninth Circuit has also authorized the use of a "commissioner" who rules on "nondispositive motions" at the appellate level. *See* U.S. Court of Appeals, Ninth Circuit, General Orders 1.8 (May 10, 1995) (defining an "appellate commissioner" as an "officer appointed by the court to rule or review and make recommendations on a variety of nondispositive matters, such as applications by appointed counsel for compensation under the Criminal Justice Act and certain motions . . . and to serve as special master as directed by the court"); *Meet Peter Shaw, Appellate Commissioner*, 9TH CIRCUIT NEWS, Winter 1994/Spring 1995 at 12.

moreover, has approved a growing delegation of authority to them.<sup>74</sup> While some unspecified “essential attributes of judicial power”<sup>75</sup> are not to be delegated, the federal judiciary now functions with an amalgam of adjudicators, some with life tenure and some without.<sup>76</sup> Importantly, commentators on all sides of the debate believe that the current number of judges (however totaled) is overloaded with work.

What the continued invocation of the 1,000 figure reflects is that, although the life tenured federal judiciary is deeply dependent on its fourth tier of trial judges and some within that judiciary are prepared to augment both its power and status,<sup>77</sup> the Article III judiciary has

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74. While not every congressional delegation has been approved, the trend has been toward expansive powers, with ongoing recommendations — many emanating from within the federal judiciary — for further delegation. For decisions considering federal adjudication by non-Article III judges, see *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995) (considering the reach of bankruptcy courts’ statutory jurisdiction over cases “related to” bankruptcy); *Peretz v. United States*, 501 U.S. 923 (1991) (upon parties’ consent, magistrate judges may supervise jury selection in felony trials); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) (discussing distinctions between public and private rights and jury trials in the bankruptcy context); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986) (upholding congressional assignment of common law counterclaims to agency adjudication); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (finding unconstitutional aspects of the Bankruptcy Act of 1978 that provided bankruptcy judges with jurisdiction over common law claims). See generally ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, A CONSTITUTIONAL ANALYSIS OF MAGISTRATE JUDGE AUTHORITY (June 1993) reprinted in 150 F.R.D. 247 (1994) [hereinafter A CONSTITUTIONAL ANALYSIS OF MAGISTRATE JUDGE AUTHORITY]; Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988).

75. *Crowell v. Benson*, 285 U.S. 22, 51 (1932); Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581 (1985) [hereinafter Resnik, *The Mythic Meaning of Article III*]; *United States v. Williams*, 23 F.3d 629 (2d Cir. 1994) (holding that magistrate judge could accept a guilty plea to a felony with defendant’s consent under FED. R. CRIM. P. 11 without violating Article III of the Constitution); *United States v. Carr*, 18 F.3d 738, 740 (9th Cir. 1994) (holding that a magistrate can preside over the “read-back” of witness testimony to the jury in a criminal trial because it was a “subsidiary matter” and therefore could be referred to a magistrate under 28 U.S.C. § 636(b)(3) (1994)).

76. In addition to the duties assigned at the trial level, bankruptcy judges also may serve on bankruptcy appellate panels (“BAPs”), reviewing decisions by individual bankruptcy judges. 28 U.S.C.A. § 158(a)-(b)(1) (West Supp. 1995).

77. When read through the eyes of one attuned to the deep resistance of some life tenured judges to any recognition of the “judicial” authority of the “other” judges, both the 1994 and 1995 reports of the Long Range Planning Committee reflect movement toward recognition of the critical role played by non-tenured federal judges. See *supra* note 45. One example is the proposed call for non-article III judges (“one bankruptcy judge and one

not come to terms with either its own current size or with the basic equivalence of the two kinds of trial judges. Functionally, the federal *trial* bench now numbers more than 1,600; the work accomplished by federal judges has already transformed the institution from whatever it was a few decades ago.<sup>78</sup>

The image of this four-tiered structure (with two stories of equal size at the bottom, and then the triangular slope forming the pyramid from trial to appellate to Supreme Court) needs yet further modification — “add ons,” if you will, of various shapes and sizes depending on the district or the circuit. Federal courts now include a retinue of other decision makers and advisors; arbitrators, mediators, early neutral evaluators, settlement specialists, and special masters augment the ranks of full time judges.<sup>79</sup>

Moving outside the federal courts — but still staying within the federal fold — agencies also have become “courts,” rendering adjudicative decisions on a caseload larger than that of the federal judicial docket itself.<sup>80</sup> We do not often speak about agencies as *courts* — but

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magistrate judge”) to participate as members of the Judicial Conference, a recommendation that has been deferred for further study and which is the subject of substantial internal debate. See 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 77 (Recommendation 52(c)); Action Notice, *supra* note 26 (Recommendation 52(c) deferred).

78. The inability to see the transformations that have occurred in familiar institutions is not limited to this context. See, e.g., Stephen Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87 (discussing how the contemporary debate about the jury rarely acknowledges changes within the jury over the past several centuries).

79. Several appellate courts have Civil Appeals Management Programs (“CAMP”) in which staff attorneys or specially-appointed lawyers and former judges conduct settlement conferences. See FED. R. APP. P. 33, *infra* note 112 and accompanying text. In fiscal year 1995, the judiciary allotted 23 staff positions, nationwide, for appellate preargument conference attorneys. Telephone interview with staff at Administrative Office (June 1995).

At the trial level, statutory authority for alternative dispute resolution programs can be found at 28 U.S.C. § 473(a)(6) (1994); rule-based authority comes from FED. R. CIV. P. 16 & 53, supplemented by the “inherent powers” of the courts. No data are kept nationwide on the numbers of persons appointed to such positions at the trial courts; many programs rely on volunteers.

80. For example, in 1993, the Social Security Administration had 358,000 pending cases and more than 509,000 hearing requests. SOCIAL SECURITY ADMINISTRATION, ANNUAL REPORT TO CONGRESS OF THE SOCIAL SECURITY ADMINISTRATION 12 (1994). The EEOC had 96,945 pending cases. See *supra* note 52. According to INS data, almost 1.5 million “adjudications” were pending as of May of 1995. Immigration & Naturalization Service,



agency adjudication is now a basic staple of the federal court system.<sup>81</sup>

One more venue needs to be marked. Completely outside the federal system of courts and agencies, one finds a host of private dispute resolution facilities that offer “judges,” mediators, facilitators, arbitrators, and counsel for those financially able to participate in private decision making facilities.<sup>82</sup> While during the 1950s, the Supreme Court voiced its concern about private *ex ante* agreements to arbitrate disputes that preclude federal adjudication of statutory rights,<sup>83</sup> the

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Performance Statistics System, INS Adjudication Data (provided at request of the author, July 5, 1995).

As noted earlier, workload measures come in different forms, and the number of pending cases is but one. *See supra* note 13 and accompanying text (Beale/Little exchange). Whatever the burden of the various dockets, the number of proceedings reflects increasing reliance on federal agencies to be responsible for first tier adjudication. *See supra* note 38 (Long Range Plan request for more agency adjudication); *see also* Liu v. Waters, 55 F.3d 421 (9th Cir. 1995) (requiring the exhaustion of administrative remedies, including submission of a challenge based on procedural errors of constitutional magnitude, to the Bureau of Immigration Appeals prior to federal court review).

81. *See, e.g.*, Paul Verkuil, Daniel Gifford, Charles Koch, Richard Pierce & Jeffrey Lubbers, *The Federal Administrative Judiciary in* OFFICE OF THE CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS Vol. II, 779, 784 (1992) (“[i]n many respects, the adjudicative caseload of federal agencies and departments, which is managed at the hearing stage by administrative judges, looks much like the cases that arise in the federal courts”). One reminder is in order. The shift to agencies was fashioned in part in the hopes of escaping the federal courts, seen as less hospitable to some forms of litigation than would be the administrative agencies. *See, e.g.*, Osmond K. Fraenkel, *The Function of the Lower Federal Courts as Protectors of Civil Liberties*, 13 LAW & CONTEMP. PROBS. 132, 143 (1948) (believing that administrative agencies “should be more effective” than courts and that, if such a “shift to administrative action occurs in . . . large areas of civil liberties, then the role of the lower federal courts as fact finders will diminish” although they will still be needed to ensure that states respect individual rights).

82. *See, e.g.*, Amy L. Litkovitz, Comment, *The Advantages of Using a “Rent-a-Judge” System in Ohio*, 10 OHIO ST. J. ON DISP. RESOL. 491 (1995). Some state judiciaries have been strongly supportive of the authority of decisions made by private providers to whom disputants have gone. *See, e.g.*, Moncharsh v. Heily & Blase, 832 P.2d 899, 915-16 (Cal. 1992) (denying judicial review of arbitrator’s decisions even if errors of law are made, including mistakes evident on the face of the award that cause “substantial injustice”).

83. *See* Wilko v. Swan, 346 U.S. 427, 434-35 (1953), *overruled by* Rodriguez De Quijas v. Shearson/American Express, 490 U.S. 477 (1989) (holding that a customer of a brokerage firm had a right to litigate a claim of violation of the Securities Act of 1933, notwithstanding that the customer had signed a contract to arbitrate future claims).

case law of the 1980s and 1990s has a decidedly different tone, endorsing arbitration and private modes of resolution of such disputes.<sup>84</sup>

*B. The Calder Mobile: Aggregate Litigation*

A second major revision within the federal adjudicatory landscape is the change in the unit of decision making. The paradigm lawsuit — a dispute between a plaintiff and a defendant that is resolved by a single judge — is under revision. Over the past decades, the aggregation of civil cases, the bringing together of claims of many different individuals to prepare them for trial, settlement, or other mode of disposition, has moved from the periphery closer to the core.

The existence of a group of litigants was until recently an exceptional event, in need of special justification. Although the 1938 revisions of civil practice invited liberal joinder of parties and claims and the 1966 revision of the class action rule made binding certain forms of group litigation,<sup>85</sup> in the 1960s, individual case processing remained the expected modality. Remember that in 1966, liberalization of the class action rule was greeted with concern, and the resulting judicial creation called a “Frankenstein monster.”<sup>86</sup> A melange of litigants was viewed with suspicion and the feasibility of responding to their claims doubted.

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84. See Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 222-29 (1995) [hereinafter Resnik, *Alternative Dispute Resolution and Adjudication*] (analyzing changing doctrine and its implications). In the 1995 term, the Supreme Court decided challenges to arbitration contracts by focusing on the terms to which the parties had agreed. See *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920, 1923 (1995) (arbitrators’ powers stem from terms to which parties agreed); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1216 (1995) (if contract to arbitrate authorizes punitive damages, that provision governs); see also *Allied-Bruce Terminix Co. v. Dobson*, 115 S. Ct. 834, 839 (1995) (interpreting the Federal Arbitration Act’s provisions to govern contracts “involving commerce” more broadly than had a state court).

85. Compare FED. R. CIV. P. 23 (1938) with FED. R. CIV. P. 23 (1966 Amendment).

86. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 572 (2d Cir. 1968) (Lumbard, J., dissenting), *vacated*, 416 U.S. 156 (1974); see also Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem”*, 92 HARV. L. REV. 664, 665 (1979) (defending the revisions against such criticism).

Further, judges recoiled at permitting relaxation of other procedural rules to permit more group litigation. For example, in the early and mid-1980s, federal appellate judges rebuffed trial judges' efforts to relax collateral estoppel rules and to mandate group treatment of mass torts in an array of cases, including those involving asbestos injuries and building collapses.<sup>87</sup> The prevailing assumption was that a "day in court" required an individual system that enabled and respected litigant autonomy and opportunities for specificity.

But those opinions, only a decade old, now have a curiously old-fashioned ring. During the 1980s, trial judges continued to press for group processing of cases — via informal management, by means of rules, by reliance on the multidistrict litigation statute, by certifying a class action.<sup>88</sup> Certain litigants sought or insisted upon group treatment; the bankruptcies of A.H. Robins<sup>89</sup> and of Johns-Manville<sup>90</sup> served to educate and acculturate lawyers, judges, and litigants to the uses of group processing in mass torts. The Judicial Panel on Multidistrict Litigation, created in 1968,<sup>91</sup> provided a similar function; by ordering consolidation of pending cases for pretrial purposes, it showed how groups of litigants could be dealt with *en masse*.<sup>92</sup>

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87. See *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982) (reversing a district court's preclusion of introduction of evidence that defendants in asbestos litigation did not have knowledge of dangerousness of product); *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982) (vacating a mandatory class action on issues of liability and punitive damages in litigation about a building collapse).

88. DEBORAH R. HENSLER, WILLIAM L.F. FELSTINER, MOLLY SELVIN & PATRICIA A. EBENER, *ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS* (1985) (Rand R-3324-ICJ).

89. See RICHARD B. SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* 37-48 (1991) (bankruptcy filed in August of 1985).

90. See, e.g., *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988).

91. Pub. L. No. 90-296, 82 Stat. 109 (codified at 28 U.S.C. § 1407 (1994)).

92. Evidence of the changing perceptions of the feasibility and utility of aggregate litigation comes from the Multidistrict Litigation Panel itself. While in the 1970s and 1980s, the panel refused five requests for inter-district consolidation of asbestos litigation, in the early 1990s, the panel revised its view — prompted in part by judges arguing for group treatment and in part by a climate that had accustomed itself to seeing groups of tort plaintiffs assembled. See Stephen Labaton, *Six U.S. Judges Will Meet on Burden of Asbestos Suits*, N.Y. TIMES, July 21, 1990, at B29; Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 36 (March, 1991) reprinted in *Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcomm. on Intellectual Property and*

This dialogue about the propriety of group litigation and its reach continues. In 1989, the Supreme Court's decision in *Martin v. Wilks*<sup>93</sup> issued a reminder — that representative structures had limits, that the resolution between the City of Birmingham, Alabama and its black firefighters could not lay to rest the questions of employment because white firefighters had not formally been "parties" to the litigation unit.<sup>94</sup> However, a footnote in the opinion also signalled the role of rulemakers (both judicial and congressional) in structuring groups. Whether by means of class actions, bankruptcy, or other forms, rulemakers can force groups of individuals to participate in a joint proceeding and preclude further claims, as long as the proper bases for inclusion are articulated and if some effort to provide notice for absentees is made.<sup>95</sup> In an effort to embrace a larger collective of individuals within the reach of judgments, Congress responded to *Martin v. Wilks* by creating such a rule when employment discrimination cases are litigated under certain federal civil rights statutes.<sup>96</sup>

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*Judicial Administration of the House Comm. on the Judiciary*, 102d Cong., 1st & 2d Sess. 381 (Oct. 24, 1991, Feb. 26 & 27, 1992) (recommending "that Congress consider legislation to expressly authorize consolidation and collective trial of asbestos cases" and in the interim or as an alternative, that judges provide group treatment of these cases).

In 1991, the MDL Panel thus assigned more than 26,000 federal asbestos cases to a single district judge for pretrial proceedings. See *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 424 (J.P.M.L. 1991) (recognizing that additional transferee judges may need to be appointed, but "deem[ing] it advisable to allow the transferee judge to make his own assessment of the needs of this docket and communicate his preference to [the Panel]").

93. 490 U.S. 755 (1989).

94. *Id.* at 761.

95. *Id.* at 762, n.2 ("We have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party . . . . [citing, inter alia, Rule 23.] Additionally, where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights . . . .").

96. The Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1071, 1076 (codified at 42 U.S.C. § 2000e-2(n)(1)(A) (Supp. 1993)). For commentary exploring the constitutional norms of due process in large-scale litigation, see Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965 (1993); Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981 (1993); Douglas Laycock, *Due Process of Law in Trilateral Disputes*, 78 IOWA L. REV. 1011 (1993).

Within a very brief time period, the presumption of individual case processing has thus been cabined. Today, aggregation has become the ordinary and expected response whenever patterns of similar cases appear in the federal and state courts.<sup>97</sup> The "asbestos litigation,"<sup>98</sup> the "breast implant litigation,"<sup>99</sup> and the "Agent Orange litigation"<sup>100</sup> have become phrases so familiar that they pave the way for the next group of cases (whether alleging harms to the environment, injuries from tobacco smoke, defaults by banks, or overcharges of consumers). Note also a somewhat comparable pattern on the criminal side; multi-defendant criminal cases have increased 80 percent since 1980 and 30 percent in the last four years.<sup>101</sup>

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97. See Resnik, *From "Cases" to "Litigation,"* *supra* note 3; Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918 (1995) [hereinafter Resnik, *Aggregation*]; Judith Resnik, Dennis E. Curtis & Deborah Hensler, *Individuals within the Aggregate: Representation and Fees*, N.Y.U. L. REV. (forthcoming 1996) (manuscript of paper presented at Research Conference on Class Actions and Related Issues in Complex Litigation) (manuscript on file with author, Nov. 1995); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961 (1993).

Of course, the shape and structure of group litigation remains a topic of case law debate. See, e.g., *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1293 (7th Cir. 1995) (granting petition of mandamus to vacate class certification in case alleging that antihemophilic factor concentrate had caused HIV-related infections; Judge Posner, for the majority, raised concerns that aggregation might create inappropriate pressures to settle or give too much authority to a single set of jurors); *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 778 (3rd Cir. 1995) (permitting certification of class action for settlement only if all the criteria of class action certification under Rule 23 are met; also rejecting fairness of settlement itself); *In re Copley Pharmaceutical, Inc., "Albuterol" Prod. Liab. Litig.*, 161 F.R.D. 456 (D. Wyo. 1995) (denying decertification of a class action against the makers of a bronchodilator and declining to apply *Rhone-Poulenc*).

98. *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991).

99. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098, 1099 (J.P.M.L. 1992) (consolidating 200 federal actions involving some 6,000 plaintiffs; subsequently more than 200,000 women filed claims for compensation).

100. See generally PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1987).

101. Administrative Office of the U.S. Courts, *The Criminal Caseload: Increasing Burden on the District Courts* at 9, Chart 9 (Long Range Planning Working Papers, June, 1993) (20 percent of all federal crime cases were multid defendant cases as of 1992); at 15, (Chart 16; rising number of jury trials with four or more defendants); at 19 ("number of multi-defendant cases has grown by 70 percent since 1980"); see also 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 110 (Recommendation 91; calling for a study of whether guidelines are needed for "federal defender organizations to represent more than one

These new lawsuits look different from the picture professors often draw of litigation as a three-sided triangle with the judge on top, listening to contesting disputants as many Renaissance paintings of the Day of Judgment depicted Jesus above supplicants in Day of Judgment scenes.<sup>102</sup> Calder mobiles seem a better visual image, offered to capture parties switching sides depending on the issue at stake.<sup>103</sup> As game theory pervades the discussion of such cases, judges, special masters, and other para-judges bob in and out as one of many sets of "players."<sup>104</sup>

This shift towards large-scale litigation affects the view of the utility and desirability of small-scale litigation,<sup>105</sup> and hence of federal judicial involvement with "small" cases. My phrasing here is deliberate: I have used the words "large" and "small" in an effort to mark the

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defendant in a multi-defendant case"); Action Notice, *supra* note 26 (Recommendation 91 deferred).

Multi-defendant cases have also given rise to prosecutorial bargaining en masse; "package pleas" are those in which the prosecutor conditions the offer of settlement on agreement by all defendants. *See, e.g.,* United States v. Caro, 997 F.2d 657, 659-60 (9th Cir. 1993) (requiring careful judicial scrutiny of the voluntariness of such pleas); United States v. Daniels, 821 F.2d 76, 80 (1st Cir. 1987) (requiring disclosure of such pleas during Rule 11 guilty plea hearings).

102. *See* Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 YALE L.J. 1727, 1745 (1987).

103. For example, in mass disaster fire litigation, defendants may include the owners and insurers of buildings, as well as those who provide products (wall paper, furnishings, and the like) and services to a building. Different sets of such defendants may, during certain phases, ally with plaintiffs in the hopes of protecting themselves from liability. *See, for example,* the description of the phases of litigation in *In re San Juan Dupont Plaza Hotel Fire Litig.*, 802 F. Supp. 624, 628-30 (D.P.R. 1992), *aff'd sub nom* *In re Dupont Plaza Hotel Fire Litigation*, Holders Capital Corp. V. California Union Ins. Co., 989 F.2d 36 (1st Cir. 1993).

104. *See* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821 (1995). This form of analysis has become common in the procedural literature. *See, e.g.,* Janet C. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 528-57 (1991) (analyzing the incentives of litigants in securities class actions); Judith Resnik, *Procedural Innovations, Sloshing Over: A Comment on Deborah Hensler*, A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation, 73 TEX. L. REV. 1627, 1628 (1995) [hereinafter Resnik, *Procedural Innovations*].

105. *See* Resnik, *From "Cases" to "Litigation," supra* note 3; Resnik, *Housekeeping, supra* note 3, at 936-40; Resnik, *Procedural Innovations, supra* note 104, at 1631-36.

difference in dimensions without ascribing value to either form. However, many of my counterparts speak of “complex” litigation contrasted with some unspecified other set of cases, implicitly those that are “simple.” With this trend toward the large-scale lawsuit and its focus on the “complex” (ergo interesting, and often involving millions if not billions of dollars), those cases that are “small,” or “ordinary,” or “simple” retreat from view. The burden of proof is shifting, such that adjudication of “small value” claims by life tenured judges is moving toward being the exceptional occasion, requiring special justification.<sup>106</sup>

### C. *Altered Modes of Processing Disputes*

Adjudication itself may become exceptional. Aggregation is one of many factors affecting the modes by which decisions are made and cases handled within the federal court system. Writing in 1955, political scientist Jack Peltason stated that the “central activity” of federal judges was “to make decisions, issue orders, and write opinions.”<sup>107</sup> At the trial level, that description is no longer accurate. The central activity of federal trial judges is not singularly focused on adjudication but rather embraces an array of methods of processing cases to move them toward conclusion.

In 1938, when nationwide federal rules of procedure were introduced, the federal procedural rule governing the pretrial process did not mention the word settlement; in 1983, that word was added.<sup>108</sup> Now, in the 1990s, settlement is enshrined as the desirable outcome for a host of cases.<sup>109</sup> By virtue of rule revision and legislative

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106. See, e.g., Robert M. Parker & Leslie J. Hagin, “ADR” *Techniques in the Reformation Model of Civil Dispute Resolution*, 46 SMU L. REV. 1905, 1915-16 (1993) (proposing tracking of cases with not all being eligible for jury or judge trials). Further, in many instances the activities of fact finding have moved from the life tenured judiciary to magistrate and bankruptcy judges and to agency adjudicators. See *infra* discussion part III.C.

107. JACK W. PELTASON, *FEDERAL COURTS IN THE POLITICAL PROCESS* 1-6, 7, 65 (1955) (describing the legitimacy of analyzing judicial behavior in modes akin to that of administrative and legislative action, that is inquiring into the interests of federal judges as a group).

108. See FED. R. CIV. P. 16 (1938), and as amended, in 1983.

109. Evidence of judicial interest in the topic stretches from higher to lower courts.

encouragement, both federal courts and Congress have demonstrated their support for alternative dispute resolution,<sup>110</sup> which has moved from outside to inside the courthouse and has become a part of the court processes itself.<sup>111</sup> This celebration of settlement is not limited to the trial level; appellate courts have created "civil appeals management programs" in which court staff offer assistance to parties in settling cases while appeals are pending.<sup>112</sup>

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Within the last year, the Supreme Court has issued several opinions amplifying the "law" of settlement. *See, e.g.*, U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386 (1994); Kokkonen v. Guardian Life Ins. Co., 114 S. Ct. 1673 (1994); Digital Equip. Corp. v. Desktop Direct, Inc., 114 S. Ct. 1992 (1994). Turning to the lower courts, in one federal district's local rules, judges are mandated to suggest settlement at every pretrial conference held. *See* DIST. CT. RULES D. MASS., L.R. 16.4(B) ("At every conference conducted under these rules, the judicial officer shall inquire as to the utility of the parties' conducting settlement negotiations, explore means of facilitating those negotiations, and offer whatever assistance may be appropriate in the circumstances.").

*See generally* Resnik, *Whose Judgment?*, *supra* note 3; Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements, 46 STAN. L. REV. 1339 (1994).

110. *See* FED. R. CIV. P. 16 (1993 amendments making plain judicial authority to require parties or their representatives to participate in settlement discussions and discussing court deployment of alternative dispute resolution); Civil Justice Reform Act of 1990, *codified at* 28 U.S.C. §§ 471-482 (1994) (encouraging the adoption of plans in each district court to curb delay and expense and including both settlement efforts and alternative dispute resolution as modes of doing so).

111. Resnik, *Alternative Dispute Resolution and Adjudication*, *supra* note 84, at 230 (what, in the 1983 amendments to Rule 16 had been called "extrajudicial procedures," in the 1993 amendments were termed "special procedures to assist in resolving the dispute" — thereby completing the location of ADR within the courthouse).

112. *See supra* note 79 (discussing the retinue of other decision makers within the federal courts). In 1974, the Second Circuit established the first such program. *See* Irving R. Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Program*, 95 YALE L.J. 755, 758-61 (1986) (the encouragement of settlement is an important aspect of the program; data indicated that it "reduce[d] by one-sixth the number of cases argued"); *see also* Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 11 (1990) (stating that the program "settles more cases than two judges would normally handle in a year at one-third the cost of two judicial chambers"). As of 1993, several circuits had such programs; in 1994, FED. R. APP. P. 33 was amended to permit appellate courts to "direct the attorneys, and in appropriate cases the parties, to participate in one or more conferences to address any matter that may aid in the disposition of the proceedings, including . . . the possibility of settlement"). *See* Resnik, *Whose Judgment?*, *supra* note 3, at 1501-03.



In 1982, I offered the term “managerial judges” to capture the shift in judicial attitude as judges established oversight of the pretrial process.<sup>113</sup> In 1990, contemporary social scientists Wolf Heydebrand and Carroll Seron detailed the “quiet revolution taking place in American courts,”<sup>114</sup> and provided a rich analysis of why the judiciary had moved toward what they termed the “technocratic rationalization of justice.”<sup>115</sup> In 1994, Stephen Yeazell considered seventy-five years of procedural innovation and concluded that revised rules of procedure had the effects of reorienting the litigation process to the pretrial phase, expanding the powers of trial level judges, and contracting authority of the appellate courts.<sup>116</sup> A transformation in the methodology of courts is well underway.

#### *D. Permeable Boundaries: Judicial Federalism*

A fourth aspect of the difficult task of understanding the present requires a shift in focus, from a discussion exclusively about the federal system to one that encompasses both federal and state judiciaries. As the Long Range Planning Committee discussed, “judicial federalism” has emerged as state and federal judges share an understanding of the relationships between and interdependence of federal and state court systems.<sup>117</sup> Hints of a new judicial entity (neither fish nor fowl, neither state nor federal) are quite recent.<sup>118</sup> In the 1980s, federal and state judges began to cross jurisdictional lines, to reach out to each other, to coordinate schedules, and to talk about shared problems.

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113. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

114. WOLF HEYDEBRAND & CARROLL SERON, *RATIONALIZING JUSTICE* 1 (1990).

115. *Id.* at 13 (the volume itself is devoted to exploring the rise of demand for court services, the factors pressing toward rationalization including fiscal constraints coupled with ever-increasing demands, and the theoretical and normative problems created).

116. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631 [hereinafter Yeazell, *Misunderstood Consequences*].

117. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 21 (chapter entitled “Judicial Federalism”); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 19 (similar chapter heading).

118. See J. Clifford Wallace, *Before State and Federal Courts Clash*, JUDGES’ J., Fall 1995, at 36 (calling for coordination).

One impetus for such joint work was the large-scale aggregated litigation; while formally based either in state or federal court, resolution of these cases increasingly depends on "global peace" — a settlement that includes all litigants. But incentives to coordinate come from a wide variety of sources,<sup>119</sup> ranging from specific topics such as prisoners' filings, criminal caseloads, and ethical rules to more general concerns that prompted leaders of both sets of judiciaries to create institutional arrangements to link them.<sup>120</sup> In 1990, the Conference of Chief Justices of State Courts and the Judicial Conference of the United States Courts authorized the creation of a "National Federal-State Judicial Council"<sup>121</sup> to enable consideration of issues of mutual concern. In 1992, the first national conference of state and federal judges demonstrated the interest in increased coordination.<sup>122</sup> In the fall of 1994, the National Center for State Courts hosted a conference for federal and state judges, lawyers, and academics specifically to discuss joint work related to mass torts.<sup>123</sup> A

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119. *Proceedings of the Western Regional Conference on State-Federal Judicial Relationships*, 155 F.R.D. 233, 273-74 (1993) (then Chief Judge Barbara Rothstein, of the United States District Court for the Western District of Washington, discussing state-federal coordination) [hereinafter *Western Regional Conference*].

120. See, e.g., Vincent L. McKusick, *Combining Resources*, NAT'L. L.J., Nov. 19, 1990, at 13 (former president of the Conference of Chief Justices of the State Courts arguing for coordination in the context of drug cases).

121. Harry W. Swegle, *Washington Perspective*, STATE COURT J., Fall 1990, at 2 ("It took 200 years to get around to it, but state and federal judges soon will begin talking to one another at the national level on a formally structured and continuing basis.").

122. Malcolm M. Lucas, *Keynote Address: National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1663 (1992) (introducing the conference); Edward B. McConnell, *Planning for the State and Federal Courts*, 78 VA. L. REV. 1849 (1992) (describing the mechanisms for coordinated work, the federal judicial committees on which state judges serve, and the conferences that had occurred); see also *Western Regional Conference*, *supra* note 119, at 237 (Reporter John B. Oakley's preface describes the regional conference as implementing the "principles" of the 1992 meeting); William K. Slate, *Proceedings of the Middle Atlantic State-Federal Judicial Relationships Conference*, 162 F.R.D. 173 (1994) (describing that gathering, also stemming from the 1992 meeting) [hereinafter *Middle Atlantic Conference*]; Victor Eugene Flango & Maria Schmidt, *Administrative Cooperation between State and Federal Courts*, JUDGES' J., Spring 1995, at 3 (summarizing survey of judge and court administrators about their views on areas for cooperation).

123. *National Mass Tort Conference Held in Cincinnati*, STATE JUSTICE INSTITUTE NEWS, Winter 1995, at 1, 8 (describing the National Mass Torts Conference, held Nov. 10-13, 1994, in Cincinnati, Ohio). The papers presented at that conference are published in the

national newsletter now reports on the increasingly routine interactions of state and federal court systems.<sup>124</sup>

The fruits of coordination are beginning to be visible — in the press, law reviews, and occasionally in the case law. Despite the formal statements of statutes and doctrine — that federal and state judicial systems are distinct and there are no mechanisms for inter-jurisdictional consolidation<sup>125</sup> — informally, federal and state judges are increasingly co-venturers, working with each other.<sup>126</sup> Federal and state judges in charge of “All Brooklyn Navy Yard” asbestos cases literally sat in the same room, jointly convening a “state and federal court” and ruling together on issues.<sup>127</sup> In the Exxon Valdez litigation, federal and state judges coordinated scheduling both the pretrial and trial processes.<sup>128</sup> The state-created Mass Tort Litigation Committee (“MTLC”), comprised of a judge from each of several states that have many mass tort cases, worked with the federal district judge

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Symposium, *National Mass Tort Conference*, 73 TEX. L. REV. 1523 (1995).

124. STATE-FEDERAL JUDICIAL OBSERVER: NEWS AND COMMENTARY OF INTEREST TO THE STATE AND FEDERAL JUDICIARY (joint publication of the Federal Judicial Center and the National Center for State Courts, first issue, Jan. 1993).

125. See, e.g., 28 U.S.C. § 2283 (1994). This statute was relied on in part to preclude state-federal consolidation in *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982).

126. William W. Schwarzer, Nancy E. Weiss & Alan Hirsch, *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992); see also John B. Oakley, *The Future Relationship of California's State and Federal Courts: An Essay on Jurisdictional Reform, the Transformation of Property, and the New Age of Information*, 66 S. CAL. L. REV. 2233 (1993) (calling in the short term for coordination and in the longer term for unification).

127. See, for example, the work of Judge Helen E. Freedman of the New York State's Supreme Court, and Judge Jack B. Weinstein of the United States District Court for the Eastern District of New York, in “All Brooklyn Navy Yard” asbestos cases. *In re Joint E. & S. Districts Asbestos Litig.*, 737 F. Supp. 735 (E. & S.D.N.Y. & Sup. Ct. N.Y. 1990); *In re New York City Asbestos Litig.*, 123 B.R. 7 (E. & S.D.N.Y. & Sup. Ct. N.Y. 1990); *In re Joint E. & S. Districts Asbestos Litig.*, 129 F.R.D. 434 (E. & S.D.N.Y. & Sup. Ct. N.Y. 1990).

128. See The Hon. H. Russel Holland, *The Exxon Valdez: Was There a Second Disaster?* 1, 8-12 (Presentation at the National Mass Tort Conference, Cinn. Ohio, Nov. 10, 1994) (on file with the author) (detailing the state and federal judicial efforts to coordinate discovery and case preparation); see also Notice of Related Case, a recommendation of the California State-Federal Council, in which counsel would be obliged to inform judges of related cases pending in either state or federal courts (Sept. 1994) (on file with the author).

assigned the multi-district breast implant litigation; thereafter that judge appointed one of the state judges as the head of the claim processing facility created as a part of a proposed settlement.<sup>129</sup>

Further, proposals have been made to change the formal prohibition on inter-jurisdictional transfers and consolidations. In 1991, the National Conference of Commissioners on Uniform Law approved the Uniform Transfer of Litigation Act, designed to enable "transfer of litigation from a court in one judicial system to a court in another judicial system."<sup>130</sup> In 1993, the American Law Institute approved a proposal for complex litigation that included provisions for consolidation of litigation across state and federal lines in either state or federal court.<sup>131</sup> Moreover, while the focus here is civil jurisdiction, the idea of sharing resources and crossing boundaries is longstanding on the criminal side, in which "cross-designation" of federal and state agents and prosecutors cross the lines between state and federal courts for crime enforcement purposes.<sup>132</sup>

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129. Details of a proposed and now defunct settlement can be found in *In re Silicone Gel Breast Implant Prods. Liab. Litig.* (Lindsey v. Dow Corning Corp) (MDL 926), No. CV94-P-11558-S, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994). See *supra* note 8; see also Henry Weinstein, *\$3.7-Billion Implant Settlement Wins Tentative OK*, L.A. TIMES, Apr. 5, 1994, at A3 (Federal District Judge Sam Pointer appointed the Hon. Ann T. Cochran, who subsequently resigned from the Texas state court judicial system, to serve as claims administrator of the settlement fund). Some of the duties of the administrator are described in *In re Silicone Gel Breast Implant*, 1994 WL 578353 at \*10, \*14, \*25. See also Sandra Mazer Moss, *State-Federal and Interstate Cooperation, Case Management Techniques Move Complex Litigation, Hasten Disposition of Asbestos, Other Cases*, STATE-FEDERAL JUDICIAL OBSERVER, Apr. 1993, at 3; *Middle Atlantic Conference*, *supra* note 122, at 202-11 (detailing coordination among state and federal judges in that and other mass torts).

130. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM TRANSFER OF LITIGATION ACT (1992) (prefatory note) (approved by the National Conference, Aug. 1991 and approved by the American Bar Association, Feb. 1992), reprinted in AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS WITH REPORTER'S STUDY at 551 (Appendix C) (1994) [hereinafter ALI, COMPLEX LITIGATION].

131. ALI, COMPLEX LITIGATION, *supra* note 130, at 165-216.

132. In 1870, Congress gave the Attorney General of the United States the authority to appoint special attorneys to assist in the "trial of any case." Act of June 22, 1870, ch. 150, 16 Stat. 162, 164 (now codified, as amended, at 28 U.S.C. § 515(a) and § 518(b) (1994)). Since then, Congress has provided additional authority for cross-designation under specific statutes. See, e.g., 42 U.S.C.A. § 5776a(e) (West 1995) (child abduction cases). Parallel statutes exist in many states; see, e.g., COLO. REV. STAT. ANN. § 20-1-201(1)(c) (West

The physical boundaries of state and federal courts (even with the “100 mile bulge”<sup>133</sup>) have so often been inscribed that it is hard to

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1995) (authorizing the appointment of special prosecutorial deputies, including United States attorneys and their assistants); *see also* J. Clifford Wallace, *A New Era of Federal-Tribal Court Cooperation*, 79 JUDICATURE 150, 153 (1995) (discussing designation by federal authorities in Arizona and Oregon of tribal prosecutors as special assistant United States Attorneys). Courts have often affirmed prosecutorial authority to cross-designate, declined to require specificity in the commissions of such designees, and welcomed the use of such coordinated activity of both prosecutorial and investigatory officials of state and federal courts. *See, e.g.,* *Elkins v. United States*, 364 U.S. 206, 221-22 (1960) (citing the need to foster cooperation between state and federal law enforcement as a ground for adopting the exclusionary rule in federal courts); *United States v. Ucciferri*, 960 F.2d 953 (11th Cir. 1992) (reinstating a federal indictment based on investigation primarily conducted by state authorities).

133. FED. R. CIV. P. 4(f) (1963 amendments) (providing that those litigants “brought in as parties pursuant to Rule 13(h) or Rule 14, or as additional parties to a pending action pursuant to Rule 19, may be served . . . at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial”). According to Wright and Miller, the 1963 amendments “recognize[d] the increased incidence of multiparty litigation in the federal courts and the need to compromise territorial boundaries in order to facilitate the handling of these cases.” 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1127, p.332 (2d ed. 1987).

The import of the 1963 amendment providing the “bulge” has been differently described. Benjamin Kaplan, then reporter for the Advisory Committee that drafted the rule, called the amendment “modest,” analogized it to interpleader in that both enable federal judges to hear “entire controversies,” and argued both its constitutionality and propriety; Kaplan also noted that the rule responded to instances when states could not constitutionally reach the “entire controversy.” Benjamin Kaplan, *Amendments to the Federal Rules of Civil Procedure, 1961-63* (I), 77 HARV. L. REV. 601, 629-34 (1964). In contrast, Allan Vestal termed the change “monumental” because it represented a move from the “traditional limited reach of the federal courts” and represented the “broad historical trend toward the supremacy of the federal government.” Allan D. Vestal, *Expanding the Jurisdictional Reach of the Federal Courts: The 1963 Changes in Federal Rule 4*, 38 N.Y.U. L. REV. 1053, 1053, 1077 (1963).

In 1993, the relevant provision was moved to FED. R. CIV. P. 4(k)(1)(B) and the language changed somewhat (providing for service of parties joined under either Rules 14 or 19 and “served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues”). As the 1993 Advisory Note explained: “In the light of present-day facilities for communication and travel, the territorial range of the service allowed, analogous to that which applies to the service of a subpoena under Rule 45(e)(1), can hardly work hardship on the parties summoned” and also noted that some “metropolitan areas span[] more than one state.” The 1993 amendments also provide for nationwide service of process in federal question cases. *See* FED. R. CIV. P. 4(k)(1)(D).

see that the lines are blurring. When federal and state judges sit together, they make permeable the boundaries between the two sets of courts and deconstruct the reality of discrete and independent court systems.

### *E. Gaping Holes*

I have just outlined four sets of changes, one related to the providers of adjudication, a second related to the size or unit of the matter to be resolved, a third related to the nature of the processing of civil cases, and a fourth related to the interactions among two theoretically distinct jurisdictions with separate sets of judges. I do not want to leave this descriptive enterprise without making plain the many missing elements and the partial perspective that I am offering.

Some may share my postmodern angst, self-conscious about narratives and appreciative not only of multiple vantage points but also the contingent nature of even these glimpses. Whether one does or not, I assume all will appreciate the impoverished empirical position from which we begin and agree that, to the extent possible, future plans should be predicated upon detailed information about the current state of affairs. While many claims are made about litigation in the federal courts, we actually know far less than we would need to about the costs, time, processes, and modes of litigation and about the participants. Data collection on the federal courts is not only a relatively recent phenomenon at a systematic level,<sup>134</sup> it is also a limited one.

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FED. R. CIV. P. 45, which provides for service of subpoenas, has an analogous provision, permitting such service "at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection." That federal courts could reach outside their own territory has been a longstanding proposition of federal law; under a 1793 provision, a federal court could subpoena witnesses not within the district but within "one hundred miles from the place of holding" the hearing. *See* 1 Stat. 333, 335, ch. 22, § 6 (1793).

134. 28 U.S.C. §§ 601, 604 (1994) (duties of Director of Administrative Office of United States Courts include examining "the state of the dockets of the courts" and reporting on "business of the courts"). That office was created in 1939. Act of August 7, 1939, Pub. L. No. 76-299, 53 Stat. 1223 (1939) (current version at 28 U.S.C. §§ 601-620 (1994)). In 1967, Congress also created the Federal Judicial Center; its charge includes research on the federal courts. Act of Dec. 20, 1967, Pub. L. No. 90-219, 81 Stat. 664 (current version at

As the long range planners themselves were acutely aware,<sup>135</sup> whole categories of information remain unavailable. While researchers are calling for development of “legal indicators” (standardized measures to understand the component elements of litigation, to enable focus on users of the courts, as well as on providers and institutions, and to capture something of the interactions among professionals, litigants, and other participants in the justice system),<sup>136</sup> the current discussion of federal court jurisdiction goes on without such sign posts.

First, we lack systematic information about the litigants and non-lawyer participants in the federal courts. Neither I nor anyone else can answer questions such as: Who uses the federal courts? What percentage of lawsuits of what kinds are filed by which people from which areas in the United States? I do not want to overstate. Federal efforts at collecting data are impressive and constantly under reconsideration; more information is available about certain pockets of the docket (such as the characteristics of criminal defendants) than others.<sup>137</sup> Further, ad hoc, intensive research (some but not all

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28 U.S.C. § 620 (1994)). Before the creation in 1939 of the Administrative Office, the Attorney General of the United States provided reports to Congress. *See, e.g.*, 1935 ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR (1935); Will Shafroth, *Federal Judicial Statistics*, 13 LAW & CONTEMP. PROBS. 200, 204-06 (1948).

135. *See* 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 99-100 (Recommendation 81(a); calling for the Judicial Conference “to establish a steering group to coordinate and define the process” of data collection, and that such a group, consisting of outside researchers as well as judiciary members do an “assessment” study to help “design the most appropriate single or coordinated network of data bases”); Action Notice, *supra* note 26 (Recommendation 81 approved); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 83-84 (Recommendation 78) (similar provision).

136. *See* Deborah R. Hensler, Developing Civil Justice Indicators: A Framework for Discussion, paper prepared for a Workshop on Civil Justice Indicators (Feb. 1993) (referring to Stanton Wheeler’s use of the term in the 1970s in a paper prepared for a conference convened by the Chief Justice Warren Burger); Marc Galanter, Bryant Garth, Deborah R. Hensler, & Frances Kahn Zemans, *How To Improve Civil Justice Policy*, 77 JUDICATURE 185 (1994).

137. On the civil side, the Administrative Office provides data on the numbers of cases commenced by “basis of jurisdiction” and “nature of suit” as well as giving information on the kinds of action taken by courts. *See, e.g.*, 1994 AO REPORT, *supra* note 13, at tbls. C-2, C-4. On the criminal side, the categories include the “major offense” and disposition. *Id.* at tbls. D-2, D-4. In addition, both the Bureau of Prisons and Sentencing Commission are data sources. *See, e.g.*, U.S. DEP’T JUSTICE, STATE OF THE BUREAU 36-37 (1992) (data on

federally-sponsored) in particular areas is starting to provide partial pictures about sets of litigants,<sup>138</sup> but we remain impoverished by our own ignorance of the population for whom the federal courts provide judicial services.<sup>139</sup>

Turning to other participants in the litigation system, we have no nationally published data about the number of women and men of what ethnicities and races who serve on grand and petit juries, about who serves repeatedly, who never.<sup>140</sup> We have limited knowledge about those who serve as experts for the federal courts,<sup>141</sup> those appointed to positions such as special masters, court-annexed arbitrators, and

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federal inmates based on gender, race, ethnicity, age, citizenship); UNITED STATES SENTENCING COMMISSION, ANNUAL REPORT 41-54 (1992) (detailing race, ethnicity, gender, age, citizenship and mode of conviction for defendants sentencing under the guidelines); *see also* LAWRENCE A. GREENFELD, PRISONS AND PRISONERS IN THE UNITED STATES (Bureau of Justice Statistics, 1992) (surveying both state and federal convicted defendants and describing them by gender, race, ethnicity).

138. *See, e.g.*, Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts, 1981-91*, 68 AM. BANKR. L.J. 121 (1994); TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 147-65 (1989) [hereinafter BANKRUPTCY AND CONSUMER CREDIT]; *see also* Karen Gross, *Re-vision of the Bankruptcy System: New Images of Individual Debtors*, 88 MICH. L. REV. 1506, 1526-28 (1990).

139. The "customer service" approach for which the Proposed Long Range Plan calls cannot easily be implemented without ongoing information about who the customers are. *See* 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 101-02 (Recommendation 85); Action Notice, *supra* note 26 (Recommendation 85 accepted); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 86 (Recommendation 82) (similar).

140. From specially-chartered task forces, one gleans a bit of information. For example, according to the DRAFT FINAL REPORT OF THE SPECIAL COMMITTEE ON GENDER TO THE D.C. CIRCUIT TASK FORCE ON GENDER, RACE, AND ETHNIC BIAS at 35-36 (Jan, 1995) (hereinafter D.C. CIRCUIT GENDER BIAS REPORT), during a six-month period in 1993, about 56 percent of the petit jurors serving in the District were women and 44 percent men. According to the Ninth Circuit's review of one year, about half of the empaneled grand jurors within the Circuit were female. THE EFFECTS OF GENDER IN THE FEDERAL COURTS, THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE, *reprinted in* 67 S. CAL. L. REV. 745, 783 (1994) [hereinafter THE EFFECTS OF GENDER].

141. *See* Joe S. Cecil & Thomas E. Willging, *Court-Appointed Experts*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 525 (1994) (relying on mailed survey and telephone information to obtain data on judicial use of experts appointed pursuant to FED. R. EVID. 706); Joe S. Cecil & Thomas E. Willging, *The Use of Court-Appointed Experts in Federal Courts*, 78 JUDICATURE 41 (1994) (summarizing data from same study).



those who serve on court committees.<sup>142</sup> As of 1992, no national mechanism routinely collected data about how each district selected lawyers to represent indigent criminal defendants; what qualifications were required; how one might be denied appointments because of prior poor performance; or which individual lawyers received what amounts of compensation over any period of years.<sup>143</sup> We also do not know the percentage of lawyers within the federal bar who appear in more than one circuit yearly and how many routinely go back and forth among which state and federal courts.

Turning from the litigants to the beginning of the civil litigation process itself, those lawyers who have filed lawsuits in the federal courts know that a form called a "civil cover sheet" must be completed. This form is a primary source of data on what kinds of cases are filed in the federal courts but has not been revised in major respects in several years.<sup>144</sup> One weakness is that attorneys are asked

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142. When task forces chartered by the federal courts have sought to paint a demographic picture of the workplace, they have had to poll each district to learn what committees existed in the courts, how lawyer representatives were selected to attend judicial conferences, and how each district appointed magistrates. *See, e.g.*, D.C. CIRCUIT GENDER BIAS REPORT, *supra* note 140, at 26-31 (court committees, invitees to judicial conference, panelists, and ADR providers); Lee Seltman, *Appointment of Special Masters to the Supreme Court and the Ninth Circuit* (June, 1992) (Working Paper of the Ninth Circuit Gender Bias Task Force, on file with author); Veronica Gentilli, *Composition of the Civil Justice Reform Act Advisory Groups* (May, 1992) (Working Paper of the Ninth Circuit Gender Bias Task Force, on file with author); Susan Factor & Veronica Gentilli, *Procedures for the Selection of Magistrate Judges within the Ninth Circuit* (January, 1993) (Working Paper of the Ninth Circuit Gender Bias Task Force, on file with author). Other researchers have also undertaken original data collection. *See* Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L. REV. 879, 893-98 (1993) (survey of 485 members of Advisory Committees appointed pursuant to the Civil Justice Reform Act of 1991).

143. Specially-chartered research projects provide information upon occasion. *See, e.g.*, REPORT OF THE COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT (Prado Report), *reprinted in* 52 Crim. L. Rep. (BNA) 2265 (Mar. 10, 1993); Maria E. Stratton & Sheryl Gordon McCloud, *Composition of the Criminal Justice Act Panels* (June, 1992) (Working Paper of the Ninth Circuit Gender Bias Task Force, on file with author); *see also* THE EFFECTS OF GENDER, *supra* note 140, at 788 (Table 3.1).

144. Form #JS44 was last updated in July of 1989 (conversation with staff of the Administrative Office of the United States Courts, June, 1995). Revisions from a form a few years earlier appear minor, such as adding a subcategory "drug related seizure of property" under the section entitled "nature of suit" and the subsection entitled "forfeiture/penalty." In

to identify a single code for the "kind of action." Since many complaints include multiple causes of actions, this requirement builds in insufficient descriptions that form the bases for classification of cases thereafter.

Despite aggregate litigation's now major impact on the federal courts, relatively little systematic information is currently gathered about that genre. No centralized agency is currently in charge of surveying and understanding the interrelationships among multi-district cases, class actions, consolidations, and other forms of aggregation.<sup>145</sup> For example, data about the MDL statute<sup>146</sup> (by which cases are joined across districts for pretrial processing and often for their duration) are kept in part by the Administrative Office of the United States Courts<sup>147</sup> and in part by the panel on Multi-District Litigation created by that statute.<sup>148</sup> Moreover, an ongoing Federal Judicial Center special study reports problems with national data that underestimate the number of class actions.<sup>149</sup> Moving from initiation to the pretrial

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1978, the form was revised to "provide more detailed accounting of Social Security cases, to clarify the form regarding class action allegations and jury demand." See Memorandum to Clerks of the United States District Courts from William E. Foley, Director, Administrative Office of the United States Courts at 1 (Dec. 8, 1978) (on file with author).

145. Published materials do not systematically evaluate the interrelationships among class actions and MDL cases, including data on who is initiating the request for MDL status, how often cases are first rejected and later certified under MDL, the frequency with which class action certification precedes MDL treatment. For example, while data are available on whether class actions were requested in cases in which MDL status is also sought, data are not readily available on how many of those cases include class action certifications, nor can one readily learn which judges have been assigned multiple MDL proceedings. For further discussion of the information now available, see Resnik, *Aggregation*, *supra* note 97, at 112-15.

146. 28 U.S.C. § 1407 (1994) (discussed *supra* notes 91-92 and accompanying text).

147. See, e.g., ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, UNITED STATES COURTS: SELECTED REPORTS AI-87 (Table C-5), 55 (Table S-10) (1993) (of 220,000 pending civil cases in the federal district courts in 1993, 37,000 or almost 17% were subjected to MDL treatment).

148. The Office of the Clerk of the MDL Panel in Washington, D.C., compiles information on the types of actions in which MDL status is requested and the action taken. See Multidistrict Automated Tracking System: Citations Summary and the Judicial Panel on Multidistrict Litigation, Statistical Analysis of Multidistrict Litigation: Cumulative From September 1968 Through September 30, 1994.

149. Thomas E. Willging, Laurel L. Hooper, & Robert J. Niemic, *Preliminary Report on Time Study Class Actions Cases* (Memorandum to the Advisory Committee on Civil

process (which has come to dominate civil litigation<sup>150</sup>), statistical information has not followed that change. The current data continue their focus on trials, whether concluded by judge or jury decision.<sup>151</sup> While settlement is a topic of enormous interest for contemporary litigation,<sup>152</sup> we know relatively little about how settlements occur currently in federal courts, what forms of settlements are desired by parties, and how much judicial time is taken when consent judgments, in contrast to dismissals, are sought. Turning to trials themselves, current data collection does not distinguish between evidentiary hearings and motions,<sup>153</sup> making it difficult to know how many "trials" occur annually.<sup>154</sup> Similarly, as the use of various alternative dispute resolution ("ADR") procedures increases,<sup>155</sup> it is essential to learn what fraction of cases, of different types, are being disposed of by what

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Rules, Feb. 9, 1995) (describing that the statistical information provided by the Administrative Office underreported the numbers of class actions found upon reviewing a random sample of filings in specific district courts) (on file with author).

150. See Yeazell, *Misunderstood Consequences*, *supra* note 116, at 632-39 ("Civil process based on the Federal Rules of Civil Procedure has largely replaced trials with motions.") (footnote omitted).

151. Two law professors from Cornell Law School have provided nationwide access, via the "world wide web" internet system, to a data base they have created by using Administrative Office data. As of this writing, data from more than three million civil cases terminated from 1971-1993 can be accessed; because those data derive from information compiled by the AO, the limitations outlined above apply to this set of data as well. See Theodore Eisenberg & Kevin M. Clermont, *Judicial Statistical Inquiry Form* (created Apr. 20, 1995, accessed by [www.law.cornell.edu/focus/statistics.html](http://www.law.cornell.edu/focus/statistics.html) or [ted@teddy.law.cornell.edu](mailto:ted@teddy.law.cornell.edu)) ("For the time being, to keep computer usage under control, you are limited to cases fully tried"). The computer-based data enables a good deal of research on outcomes of such cases. See Presentation of Kevin Clermont, *Whither Due Process? Here to Stay* (presentation at the American Association of Law Schools, Workshop on Civil Procedure, Washington D.C., June, 1995) (discussing the effects of transfers on the rate at which plaintiffs win cases).

152. See *supra* Section IIC.

153. 1994 AO REPORT, *supra* note 13, at 14 ("Trials include those proceedings resulting in a verdict by a jury or final judgment by the court as well as other contested hearings where evidence is presented.").

154. See Little, *supra* note 13, at 1048-49 (discussing the Administrative Office's definition of a "trial" and arguing that pretrial motions in criminal cases likely prompt evidentiary hearings at rates more frequent than in civil trials, and therefore that the AO definition makes criminal "trials" appear more frequently than they actually occur); Charles D. Weisselberg, *Evidentiary Hearings in Federal Habeas Corpus Cases*, 1990 B.Y.U. L. REV. 131, 165, n.188 (also describing the AO statistical definition of trials and its problems).

155. Little, *supra* note 13, at 1048-49.

kinds of different procedures and whether those answers change over time.<sup>156</sup> For example, while much discussion is had about ADR, the frequency of its deployment is the subject of controversy.<sup>157</sup>

Let me turn now from questions about litigants and cases to information about judges. Many aspects of the work of the newest sets of federal judges — magistrate and bankruptcy judges — are not data-based. While individual circuits have conducted studies of magistrate judges,<sup>158</sup> while the FJC did a report in the mid-1980s on the use of magistrate judges in nine districts,<sup>159</sup> and while the Administrative Office recently analyzed the governing case law,<sup>160</sup> national data bases do not provide ready access to the number and kind of delegations to magistrate judges, the requests for review of magistrates'

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156. Again, special research projects, focusing on a particular issue and a particular time frame, undertaken by either the FJC or the AO illuminate some of these issues, including implementation of the Civil Justice Reform Act and the use of ADR. *See, e.g.*, Donna Steinstra, *ADR in the Federal Courts*, 7 FJC DIRECTIONS 4 (Dec., 1994). The Institute for Civil Justice of RAND also has a congressional grant to study the effects of the CJRA. *See* Terence Dunworth & James S. Kakalik, *Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1303 (1994).

157. *See, e.g.*, Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 917-18 (1991) (while several districts have ADR programs, "many . . . have never used any ADR procedure . . . [or do so in] only a limited number of cases"); Steinstra, *supra* note 156, at 5 ("at least two-thirds of the courts now authorize one or more forms of ADR"); Dunworth & Kakalik, *supra* note 156, at 1330-34 (writing a few years later that Dayton and reporting that virtually all of the "pilot districts" under the Civil Justice Reform Act had "an ADR program of one kind or another," but also noting that the volume of activity within such programs was not equal across districts).

158. REPORT OF THE NINTH CIRCUIT JUDICIAL COUNCIL'S ADVISORY COMMITTEE ON UNITED STATES MAGISTRATES, STUDY OF MAGISTRATES WITHIN THE NINTH CIRCUIT COURT OF APPEALS (April 15, 1990).

159. CARROLL SERON, THE ROLE OF MAGISTRATES: NINE CASE STUDIES (Federal Judicial Center 1985).

160. CONSTITUTIONAL ANALYSIS OF MAGISTRATE JUDGE AUTHORITY, *supra* note 74.

decisions,<sup>161</sup> the number of reversals and affirmances,<sup>162</sup> or parallel information about bankruptcy judges' rulings.

Other questions relate to the appellate process. Information is available on the quantity of appeals, the time of processing, and whether oral argument is had. General description is also provided about whether cases are terminated "on the merits" as contrasted with "procedural terminations," as well as whether decisions are reversed, as contrasted with dismissed, remanded, affirmed or enforced, or something else.<sup>163</sup> The bases on which appellate courts reversed trial judges are not, however, adequately illuminated. For example, while we know that in 1994, more than 10 percent of cases were reversed on appeal,<sup>164</sup> we do not know much about why cases were reversed (i.e., how often do appellate courts find errors in factfinding? what kinds of errors of law are used as the bases for rejection?). Also, while one can tell the frequency of oral argument, as contrasted with submission on the papers,<sup>165</sup> not reported is the frequency of unpublished decisions nor which cases are selected for *en banc* review.

These kinds of materials would inform the current debate about proposals to abolish appeal as of right,<sup>166</sup> which the Long Range Planning Committee rejected.<sup>167</sup> In light of increased reliance on staff

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161. See 28 U.S.C. § 636(b) (1994).

162. Other issues relate to magistrate judges themselves, such as their selection, rates of reappointment (for example to learn whether a system of de facto tenure evolves), and the number of magistrate judges who subsequently become life tenured Article III judges. See CHRISTOPHER E. SMITH, UNITED STATES MAGISTRATES IN THE FEDERAL COURTS: SUBORDINATE JUDGES (1990) (history of magistrate judges including information on selection of judges and their roles).

163. 1994 AO REPORT, *supra* note 13, at A-1 to A-17 (Tables B, B-1, B-4, B-5, B-7).

164. *Id.* at A-9 (Table B-5; U.S. Courts of Appeals Cases Terminated on the Merits and including categories on nature of suit, such as "criminal," bankruptcy," civil excluding prisoners, and also delineated by circuits).

165. *Id.* at A-2, Table B-1 (of 27,219 terminations on the merits, 11,047 occurred after oral argument, while 16,172 occurred based on submission on the briefs).

166. REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT TO THE JUDICIAL CONFERENCE COMMITTEE ON LONG RANGE PLANNING 8-9 (1993) (recommending discretionary appeals); see generally Judith Resnik, *The Death of Appeals?*, 5 FIFTH CIRCUIT REP. 637 (1988).

167. See 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 41 (Recommendation 17; rejecting "the notion of discretionary appellate review"); Action Notice, *supra* note 26

attorneys, unpublished opinions, and less oral argument, it is possible that discretionary review has already taken hold in practice in certain categories of cases, making the statutory right of appeal less significant. In sum, our ability to understand the effects of proposals is constrained by the limits of our knowledge of current practices across the federal docket.

#### IV. SELECTING MEMORIES

The debate about federal jurisdiction is also constrained by invocations of the past that are partial and selective. Here again I use as illustrative the Proposed Long Range Plan of the federal judiciary. Recall its premises introduced at the outset: that the federal courts have a special and distinct mission; that given the need to preserve such distinction, a very few judges should have life tenure, but that this corps is now facing too many cases. Hence, one of the proposed responses was to argue that Congress should resist giving the federal courts new work to do.

The 1995 Proposed Plan offers as its first recommendation the “overarching principle” that Congress “commit itself to conserving the federal courts as a distinctive judicial forum of limited jurisdiction . . . [and assign cases] only to further clearly defined and justified national interests, leaving to the state courts the responsibility for adjudicating all other matters.”<sup>168</sup> To that end, the plan states a series of “prudential guidelines for limiting federal jurisdiction.”<sup>169</sup> Where do

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(Recommendation 17 deferred). The 1994 draft adopted the same position. 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 35.

168. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 23 (Recommendation 1); Action Notice, *supra* note 26 (Recommendation 1 deferred). The 1994 draft did not offer a parallel general frame but its subsequent recommendations contained the same premise.

169. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 23; *see also id.* at 27 (Recommendation 6; calling for Congress to “exercise restraint in the enactment of new statutes that assign civil jurisdiction to the federal courts and [to do] so only to further clearly defined and justified federal interests”); Action Notice, *supra* note 26 (Recommendation 6 deferred); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 23 (Recommendation 5; stating that “Congress should assign civil jurisdiction to the federal courts only to further clearly defined and justified federal interests, and it should not create new rights of action concerning matters traditionally cognizable by state courts”).

presumptions *against* federal jurisdiction and such guidelines come from? While historical use of the federal courts was often invoked by the planners, its premises come from remembering part, but not all, of the past.

#### A. *Many Jurisdictional Histories*

The implicit baseline of the Long Range Plan is that what has been within the jurisdictional preserve of the state courts should not, absent special justification, become a matter for federal court jurisdiction. At points, this approach translates into an assumption that what *has been* state jurisdiction is presumptively what *should be*.<sup>170</sup> Yet the planners do not take the same approach to *federal* jurisdictional history; they also propose de-accessing certain historical categories of federal jurisdiction. Several problems accompany this selective reliance on historical categories of jurisdiction.

First, no single history exists. Instead, there are a series of traditions about the allocation of authority between state and federal courts. These traditions are multifaceted and rich, permitting a range of normative claims to be couched in historical practices but varying

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On the criminal side, the planners state that in “principle, criminal activity should be prosecuted in a federal court only in those instances in which state court prosecution is not appropriate or where federal interests are paramount.” See 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 23 (Recommendation 2); Action Notice, *supra* note 26 (Recommendation 2 deferred); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 20 (Recommendation 1, similar); see also Weis Statement, *supra* note 27 (“Planning for the future must include measures to limit the caseload and the size of the federal courts to the extent that the judiciary can do so”). Judge Weis chaired the Federal Courts Study Committee. *Id.*

170. Justice Scalia has used a related approach to define the content of procedural due process. See, e.g., *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (upholding state court jurisdiction based on the physical presence of a defendant when served; that practice was both “old” and “continuing,” and such “continuing traditions of our legal system . . . define the due process standard of ‘traditional notions of fair play and substantial justice.’”); see also *Medina v. California*, 505 U.S. 437, 446 (1992) (Kennedy, J. for the Court, also relying on “historical treatment” as a basis for determining due process rights).

significantly.<sup>171</sup> Even if the touchstone of what should be is what was — to *what* within the 200 years of history should one hark back?

For example, in an essay a few years ago, Richard Fallon nicely set forth two competing conceptions of the federal judicial role. He termed one a “nationalist model” and another a “federalist model,” and then detailed the claims made on behalf of both and the historically relevant moments to which each turned.<sup>172</sup> For the federalists, the founding of the nation is key; the states are the backdrop court system, and the federal courts are part of the extra court system, to be employed only in the exceptional moment.<sup>173</sup> For the nationalists, the Civil War, the Fourteenth Amendment, the New Deal, and the 1960s Civil Rights movement revised the story and shifted the focus; the stress is on federal courts involvement.<sup>174</sup> From these differing

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171. The recent Supreme Court debate about the reach of Congress’s powers illustrates the degree to which debate about the fundamental contours of federalism remain unresolved; in the two major decisions of the 1995 term, the Court was divided 5-4 in each. *See, e.g.*, *United States v. Lopez*, 115 S. Ct. 1624 (1995) (Congress lacks power to prohibit the sale of a gun within a 1000 feet of schools because such activity lacks sufficient relationship to interstate commerce); *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995) (states do not have authority to alter qualifications for national offices).

172. Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1151-64 (1988) [hereinafter Fallon, *Ideologies*]. Other scholars have offered different delineations. *See, e.g.*, Akhil Reed Amar, *Five Views of Federalism: “Converse-1983” in Context*, 47 VAND. L. REV. 1229, 1231-32 (1994) (discussing “perspectives” on the relationship between state and federal courts) [hereinafter Amar, *Five Views*]; Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563 (1994) (describing “territorial,” “federal process,” and “autonomy” models). *But see* Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 569 (1995) (arguing that a series of rebellious moments constitutes our “ongoing tradition of revolutionary reform”).

173. Fallon, *Ideologies*, *supra* note 172, at 1151-57 (states as equally “competent” and absent contrary evidence, federal judges should assume state court abilities).

174. *Id.* at 1158-64 (discussing the “special role” for federal judiciary and ready access). *See also* Amar, *Five Views*, *supra* note 172, at 1231-32 (describing the perspective of the states as “wrongdoers”); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (discussing the states as wrongdoers in need of federal oversight); LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 34-44 (1994) (arguing that the federal courts are “far better forums for the vindication of rights than are the state courts”); and Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869 (1994) (providing a historical case study of events in the southern parts of the United States in the 1950s and 1960s and arguing that jurisdictional rules are deeply embedded in particular disputes).



visions, one could create two kinds of presumptions, one about presumptive reliance on state courts and the other about a presumptive welcome to the federal courts.

One could use other examples of jurisdictional tradition — not aspiring to a two-century overview but instead focused on specific areas of law. As Professor Rory Little has summarized it, by 1790 federal criminal jurisdiction reached bribery, false statements, “murder, maiming, theft, fraud, and even receiving stolen property.”<sup>175</sup> Scanning the two centuries, Professor John Jeffries and Judge John Gleeson concluded that, even before the 1994 crime bill, “federal law reached virtually all robberies, most schemes to defraud, many firearms offenses, all loansharking, most illegal gambling operations, most bribes, and every drug deal, no matter how small . . . .”<sup>176</sup>

During this century, calls for increased federal jurisdiction over crime have become common. As a 1934 commentator put it: “Recent hysteria brought on by a number of sensational crimes has given rise to insistent demands for vastly increased federal activity in criminal law administration.”<sup>177</sup> One could therefore describe federal criminal

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175. Little, *supra* note 13, at 1063; *see also id.* at 1034 (arguing that it is mythic to perceive of the “federalization of crime [as] a new phenomenon.”); David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 833 (1994) (describing congressional creation of federal crimes beyond the “explicit constitutional authority” and arguing that the First Congress believed itself authorized to create federal criminal law “necessary and proper to the exercise of some other explicit federal power”) (footnote omitted). In contrast to Little, Professor Kathleen F. Brickey argues that the “federalization of American criminal law is a twentieth century phenomenon.” Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1135, 1137-41 (1995).

176. John C. Jeffries Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1095-96 (1995). For a snapshot a half century earlier, *see* L.B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors’ Discretion*, 13 LAW & CONTEMP. PROBS. 64 (1948) (discussing “national criminal jurisdiction, [ranging from] treason to hunting offenses, occupying approximately one quarter of the federal judges’ time”) (footnote omitted).

177. Jerome Hall, *Federal Anti-Theft Legislation*, 1 LAW & CONTEMP. PROBS. 424, 426-34 (1934) (describing the enactment of the National Motor Vehicle Act of 1919 and the enlargement of federal jurisdiction over thefts); *see also* John Brabner-Smith, *Firearm Regulation*, 1 LAW & CONTEMP. PROBS. 400, 405 (1934) (discussing the then first federal legislation regulating guns).

jurisdiction as having an expansive tradition, providing the basis for yet further congressional enactments. Alternatively, while federal jurisdiction over a variety of crimes has now a long and distinguished tradition,<sup>178</sup> one may well want — given other national priorities — to abandon some of what has now become familiar if not traditional areas of federal court jurisdiction.<sup>179</sup>

That history is messy or multi-faceted does not require rejection of historical practices but rather self-conscious work at exploring how and why one selects a particular set of practices as exemplary. But other difficulties also counsel skepticism about drawing sustaining guidance from history in this particular context. A good deal of discussion of the jurisdictional boundaries of the federal courts depends on the invocation of these categories as if they had clear content. As the final report of the Long Range plan put it, the task is “identifying the *essentials* of federal court jurisdiction.”<sup>180</sup> But given the long history of concurrency of jurisdiction authority, state and federal courts overlap and resemble each other — in caseload terms — in an array of areas. If some areas have yet to be fully included in the overlap, should they now be precluded because they come to the fore during an era in which barriers to federal jurisdiction are advocated?

Moreover, “state” and “federal” interests are not pre-existing sets but are interactive and interdependent conceptions that vary over

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178. One might delineate two traditions, one that existed during the first century of the country's life and a second, developed over the past one hundred years. Schwartz argued that for almost a century, the federal government's criminal machinery was directed toward prosecuting “acts directly injurious to the central government.” Schwartz, *supra* note 176, at 65. However, after the Civil War, Congress turned to “employing federal sanctions to protect private individuals from invasion of their rights by other private individuals — a traditional function of state law.” *Id.* According to Schwartz, the “gradual assumption of the power to punish for ordinary crimes proceeded concurrently with a great expansion of the role of the central government in many public-welfare fields.” *Id.* at 66.

179. The Long Range Plan followed this route in part; see 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 25 (Recommendation 3; “Congress should review existing federal criminal statutes with the goal of eliminating provisions no longer serving an essential federal purpose.”); Action Notice, *supra* note 26 (Recommendation 3 deferred); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 22 (Recommendation 2, similar).

180. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 23 (emphasis added); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 20 (same).

time.<sup>181</sup> This problem surfaces repeatedly in debates among Supreme Court justices about the meaning and reach of the Tenth Amendment,<sup>182</sup> the Eleventh Amendment, and the Commerce Clause. At issue in Tenth Amendment debates are the kinds of activities so essential to a state's sovereignty that the United States Supreme Court should announce that Congress is constitutionally prohibited from legislating. For example, could Congress insist on minimum wages for state employees or was the decision about payment of employees an "essential" attribute of sovereignty that was the constitutional preserve of the states?

Reading these federalism cases, one is reminded that the construction of roads and the provision of social welfare were once deemed "private" activities, superintended by neither the state nor federal governments,<sup>183</sup> while educational facilities were often supported by public and private resources.<sup>184</sup> Mark Tushnet makes a further point:

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181. For critique of theoretical approaches in other contexts that assume the validity and utility of conceiving of socially-embedded categories in essential terms, see ELIZABETH SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

182. See, e.g., *National League of Cities v. Usery*, 426 U.S. 833 (1976) (invalidating the Fair Labor Standards Act's application to localities); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *National League of Cities* and upholding congressional authority to regulate wages of transit workers of a locality); *New York v. United States*, 505 U.S. 144 (1992) (while Congress can create incentives for states to share in the problems of nuclear waste disposal, the federal government cannot compel states to accept nuclear waste). As Professor Erwin Chemerinsky rightly points out, while the Supreme Court was denying states' claims to exemptions from federal legislation based on federalism, the Court was also relying on federalism as a justification for denying federal jurisdiction over an array of cases. Erwin Chemerinsky, *The Values of Federalism*, U. FLA. L. REV. (forthcoming 1995). More recently, as the Court has relied on federalism to check Congress, a more symmetrical approach exists. *Id.* at 25 (manuscript on file with the author).

183. See, e.g., *Garcia*, 469 U.S. at 539-47 (Justice Blackmun described the difficulty of distinguishing "governmental" versus "proprietary" functions and rejected the possibility that a "workable standard for 'traditional governmental functions'" could be developed; also discussing the limited utility of historical tests). The bases for this decision are illuminated by Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 VAND. L. REV. 1623, 1626-34 (1994) (explaining that Justice Blackmun had initially voted in conference in *Garcia* to overrule Congress but that, upon attempting to draft that opinion for a then-majority, he became persuaded that he could "find no principled way" to do so).

184. See NEWTON EDWARDS & HERMAN G. RICHEY, *THE SCHOOL IN THE AMERICAN*

that many government functions are not themselves performed by governments but are contracted out to private entities.<sup>185</sup> Political scientist Morton Grodzins fights the dichotomization itself and argues that the role of governance has long been shared by federal, state, and local authorities, as well as by public and private actors.<sup>186</sup> Hence, a claim that something is intrinsic to the state's governance becomes problematic, in part because what provinces are governmental (belonging either to the states or to the nation or to both<sup>187</sup>) vary with time and technological changes that alter the relevance of geographical boundaries,<sup>188</sup> and in part because of the overlap in function among governmental actors.

During the late eighteenth and early nineteenth centuries, land speculation and holding were "national," "federal" issues of great import to the creation of a central government.<sup>189</sup> In the late nineteenth

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SOCIAL ORDER 211 (1963) (claiming that, at the founding, "no one could have foreseen that education would come to be regarded as one of the essential functions of government;" arguing that the rise of interest in public education was linked to concern about the need for an educated populus to enable republican institutions to function); LLOYD P. JORGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925* (1987) (arguing that the history of public and private involvement demonstrates that states could subsidize non-public secular educational institutions).

185. Tushnet, *supra* note 183, at 1639.

186. GRODZINS, *supra* note 2, at 5-24 (including foreign affairs as an example, and also noting that while the Constitution bars certain federal officials from simultaneously holding office in other branches of the federal government, no such constitutional bar operates to preclude dual office holding between state and federal governments).

187. GRODZINS, *supra* note 2, at 4 (education is misunderstood as a purely "local" function; both state and federal involvement make this function of government, like most others, shared).

188. *New York v. United States* provides a good example; both nuclear waste and its ready transport, as well as its extraterritorial risks, are artifacts of the twentieth century. For Justice O'Connor, in the majority, Congress' insistence that states either regulate the disposal of low level nuclear waste or take title to it impermissibly "commandeer[ed]" the state's function and relegated them to administrative arms of the federal government. 505 U.S. 144, 176 (1992). For the dissenters, the states' participation in the process of generating the legislation sufficed. 505 U.S. at 205-06 (White, J., dissenting). See also Merritt, *supra* note 172, at 1564-66 (discussing the limitations of a theory of federalism based on territory).

189. John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, at 18-22 (1948) (Twenty-five Supreme Court cases, many brought by virtue of diversity jurisdiction, about "interests in public lands between 1790 and 1815"; the "Supreme Court aided virtually every land speculator who came before it from 1790 to

and early twentieth century, labor-management relations moved into national focus and onto the federal courts' agenda.<sup>190</sup> Kidnapping for ransom became a national concern in 1932 in the wake of the abduction of a child of Charles Lindbergh.<sup>191</sup> The era of federal prohibition of alcohol resulted in a federal prison population in the early 1940s in which about half of the inmates were incarcerated for "liquor law violations."<sup>192</sup> Also during the twentieth century, both the New Deal and the 1960s Civil Rights movement prompted Congress to define a

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1815") [hereinafter Frank, *Historical Bases of the Federal Judicial System*]. On "congressional instrumentalism" when deciding the boundaries of federal court subject matter jurisdiction in the early years, see WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC* 51-53 (1995) ("the drafters of the Judiciary Act viewed the federal courts as a tool to effect specific substantive results").

190. Ray Forrester, *The Jurisdiction of Federal Courts in Labor Disputes*, 13 LAW & CONTEMP. PROBS. 114 (1948).

191. Horace L. Bomar, Jr., *The Lindbergh Law*, 1 LAW & CONTEMP. PROBS. 435, 435-36 (1934) (in 1931, while 279 kidnappings were reported in 501 cities, only 69 convictions were reported; proposals for federal jurisdiction over inter-state kidnappings had been made but none were enacted until after that "atrocious deed"). For discussion of both the federalization of car theft in 1919 and the subsequent "de facto defederalization" by prosecutorial decisions not to bring such cases, see Little, *supra* note 13, at 1068-69 (between 1922-33, an average of 1,466 auto theft prosecutions were brought, but by 1991 such filings were less than 205 a year).

In the 1930s, bank robbery also first became a federal crime. See Act of May 18, 1934, ch. 304, 48 Stat. 783. According to the Justice Department, impetus for the bill came from difficulties contending with organized gangsters "sufficiently powerful and well equipped to defy local police, and to flee beyond the borders of the State before adequate forces can be organized." See H.R. REP. NO. 1461, 73d Cong., 2d Sess., at 2 (1933) (Statement of Attorney General); see also *A Note on the Racketeering, Bank Robbery, and "Kick-Back" Laws*, 1 LAW & CONTEMP. PROBS. 445, 448 (1934) ("[S]ince only federal forces are free to conduct their operations without regard for state lines, the federal government is in a strategic position to combat such activities"). Convictions under bank robbery statutes have increased from 118 in 1941, to 237 in 1961 and to 1740 in 1994. See 1941 U.S. ANNUAL REPORTS OF THE ATTORNEY GENERAL at 102; 1961 ADMINISTRATIVE OFFICE REPORT at 280 (Table D4); 1994 AO REPORT, *supra* note 13, at A-78 (Table D4). See Brickey, *supra* note 175, at 1144 (by legislation such as this, local problems became national ones).

192. James V. Bennett, *Excerpts from Report on Federal Youthful Offenders*, Table A, reprinted in REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON PUNISHMENT FOR CRIME 41 (Appendix I) (1942). In terms of the focus of federal criminal enforcement during that era, see Schwartz, *supra* note 176, at 64 (of the 31,114 criminal cases in 1947, 3,244 or more than 10 percent were filed under the National Motor Vehicle Theft Act, the "Dyer Act"; the two largest categories prosecuted were "fraud and other theft" which represented 7,082 cases or almost 23 percent, and immigration which represented 7,029 cases, also about 23 percent); see also Hall, *supra* note 177, at 424.

myriad of issues, some relating to economic wherewithal and some to civil liberties, as "federal."<sup>193</sup> In the past few years, a battle has been fought about whether violence against women is a national issue to which federal judicial attention ought to be paid,<sup>194</sup> and about the scope of federal court criminal jurisdiction.<sup>195</sup>

What today appears to be of local concern may tomorrow be on the national agenda.<sup>196</sup> Moreover, as illustrated by the current debate about welfare and speed limits on highways, some advocate turning federal programs and rules over to state governance.<sup>197</sup> Objecting to the very effort of identifying "fixed spheres of federal and state activity," Jamie Gorelick and Harry Litman conclude that "a limiting principle cannot be squared with the historical development of the federal courts' jurisdiction."<sup>198</sup> In short, the tradition of allocation

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193. Fallon, *Ideologies*, *supra* note 172, at 1158-64; *see also* Little, *supra* note 13, at 1059 (discussing how what might be termed "ordinary" street crime is sometimes perceived to have federal dimensions because of the relationship between those assaults and racial hostility).

194. In 1994, Congress answered in the affirmative, enacting the Violence Against Women Act of 1994, Pub. L. No. 103-122, § 40302, 108 Stat. 1941 (codified at 42 U.S.C.A. § 13981 (West Supp. 1995)). For the four years during which the proposal was pending, federal judicial voices and many lawyers voiced opposition. *See* Naomi R. Cahn, *Family Law, Federalism and the Federal Courts*, 79 IOWA L. REV. 1073, 1108-11 nn.188-193 and accompanying text (1994) (reviewing exchanges among federal and state judges and Senator Biden, one of the legislative sponsors). In 1993, the Judicial Conference of the United States changed its position from one of opposition to the proposed new cause of action to one of taking no position, and to supporting the provisions for studies of gender bias, also provided in the legislative history. *See* Judicial Conference Resolution on Violence Against Women (March 1993), *reprinted in* REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 28 (March 16, 1993); *see also* Chief Justice's 1991 Year-End Report on the Federal Judiciary, 24 THIRD BRANCH 1, 3 (1992) (discussing Judicial Conference's then opposition that would "involve the federal courts in a whole host of domestic relations disputes").

195. Little, *supra* note 13, at 1034-70; *United States v. Lopez*, 115 S. Ct. 1624 (1995) (dividing 5-4 on whether the use of a gun "substantially affects interstate commerce").

196. And an international one as well. *See* Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441, 1461-62 (1994) (state authority over alcohol and taxation may be affected by GATT); *see also* Cahn, *supra* note 194, at 1114-15 (family law increasingly an issue of national import and deserving of federal court attention).

197. *See* Pub. L. No. 104-59, § 205 (repealing 23 U.S.C. § 154 (1995), the national maximum speed limit provision).

198. Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967 (1995).

between state and federal government is one constantly being reworked;<sup>199</sup> periodically, events prompt Congress and the Supreme Court to revisit the allocation of authority, and the lines move.

Indeed, the very existence of a proposed *future* plan for the federal judiciary testifies to the fact that the needs of the country have changed over the past decades and that more, and perhaps profound, changes are to be anticipated. Hence, the *status quo* is insufficient to the task. Even assuming one could identify common practices in the past, at the least a question needs to be asked about why federal jurisdictional rules from either the nineteenth or the twentieth centuries should form the predicate for the vision of the twenty-first century. Even if the allocations between governments were stable over the past two hundred years, those allocations may not inform aspirations for the federal courts' long range future plan.

### B. Guidelines and Missing Categories

The invocation of a claimed history of limited federal court jurisdiction is not the only basis upon which the Long Range Plan hopes to reign in Congress.<sup>200</sup> The Plan also describes six categories in which

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199. According to Larry Kramer's thoughtful consideration of how the federal system has been maintained over the centuries, while the Constitution envisioned some boundaries — areas outside the reach of federal law, [t]hose boundaries have almost disappeared today." Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1496 (1994) [hereinafter Kramer, *Understanding Federalism*]. Given the power of Congress to preempt state law on a myriad of matters, even the 1995 term's reassertion of congressional limits does not constitute, for Kramer, a substantial restriction on the general legislative authority of Congress and on the arenas in which federal courts may be enlisted. *Id.* at 1498 n.23 (discussing the then-pending *Lopez* case and commenting that "judicial interference [with Congress] will remain exceptional even when it comes to laws regulating 'states qua states'").

In contrast, William Eskridge and John Ferejohn delineate certain decisions of governance, relating to public safety and promotion of economic development, and locate them in the states ("traditional state functions"), as contrasted with issues that they assume have greater "externalities" affecting nonresidents or are a part of "widely shared constitutional values" and thereby located as national functions. William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355, 1360-61, 1371, 1397-1400 (1994). However, the difficulty with such an approach is not only the one they recognize — the problem of identifying "what constitutes a widely shared constitutional value." *Id.* at 1399. In addition, what is perceived to have "externalities" changes over time, in part because of technological advances.

200. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 21 ("Beyond historical

it views federal civil jurisdiction as properly conferred,<sup>201</sup> specifically when matters “arise under the United States Constitution;” “deserve adjudication in a federal judicial forum because the issues presented cannot be dealt with satisfactorily at the state level and involve either (1) a strong need for uniformity or (2) paramount federal interests;” “involve the foreign relations of the United States;” “involve the federal government, federal officials, or agencies as plaintiffs or defendants;” “involve disputes between or among the states;” or “affect substantial interstate or international disputes.”<sup>202</sup>

This listing is intriguing in part because it does *not* reflect a good deal of federal jurisdictional history. Until 1875, Congress did not provide the federal trial courts with general federal question jurisdiction,<sup>203</sup> the very kind of jurisdiction that many today assume to be

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practice, the allocation of limited jurisdiction to the federal courts is justified by both theory and practice.”). The planners argue that, as a matter of theory, duplication without distinction has no utility. Compare Amar, *Five Views*, *supra* note 172, offering the diffusion of power and the competition among governments as reasons for federalism and claiming that such diffusion worked to protect freedom; Richard Briffault, “What About the ‘Ism?’” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1344 (1994) (arguing that state governments (and implicitly therefore their courts) exist simply because they do, under the United States Constitution, which protects their fixed boundaries, territorial integrity, law making powers, and their identity as units of governance). See discussion *infra*, Part IV.

201. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 27-29 (Recommendation 6(a)-(f)); Action Notice, *supra* note 26 (Recommendation 6 deferred); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 23-24 (Recommendation 5(a)-(f)).

202. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 27-29 (Recommendation 6); Action Notice, *supra* note 26 (Recommendation 6 deferred). The wording of the six categories is the same from draft to final plan with the exception of one category, which in draft form was described as involving “a clear need for national uniformity on an issue that, in light of experience, cannot be dealt with satisfactorily at the state level.” 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 24 (Recommendation 5).

203. Act of March 3, 1875, § 1, ch. 137, 18 Stat. 470 (establishing federal jurisdiction over suits arising under the laws of the United States “where the matter in dispute exceeds . . . five hundred dollars”). Cases arising under federal law could, prior to 1875, find their way into federal trial courts by virtue of a variety of statutes including jurisdictional grants when the United States was a party and for diversity cases; statutes granting federal jurisdiction in certain forfeiture actions; and of course in areas of law committed to the exclusive jurisdiction of the United States. See, e.g., The Judiciary Act of 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76-77, 78-79. Also, in 1801, Congress conferred and then withdrew jurisdiction for cases arising under the Constitution. Act of Feb. 13, 1801, 2 Stat. 89, 92; Act of March 8, 1802, 2 Stat. 132. Further, federal question cases were considered by the



the quintessential federal moment — decision making in cases “arising under the Constitution, laws, or treaties of the United States.”<sup>204</sup> Moreover, until 1980, Congress required that such jurisdiction be limited by an amount in controversy.<sup>205</sup>

Yet even this seemingly obvious category of federal jurisdiction has spawned extensive debate about what claims or causes of action arise under federal law, as contrasted with those that refer to or implicate federal law but also involve issues of state law.<sup>206</sup> That many claims might be characterized as state or federal is yet further evidence of another aspect of “judicial federalism” — that rights of action fit neither box (exclusively) and fit both.<sup>207</sup>

Other historically-based categories of federal jurisdiction are absent from the categories listed by the Long Range Plan. Diversity jurisdiction is one of the longest standing traditional bases of federal court jurisdiction.<sup>208</sup> According to John Frank, between 1790 and 1815, diversity cases comprised the largest segment of the docket of the Supreme Court.<sup>209</sup> In his words, “[t]he whole federal judicial system [during this era] gave almost its entire attention to the settlement of

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United States Supreme Court. See Vicki C. Jackson, *The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 13-29 (1988) (discussing the relationship between Supreme Court review of federal questions and the reach of federal trial courts’ jurisdiction over states).

204. See 28 U.S.C. § 1331 (1994); 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 27 (Recommendation 6, calling for federal jurisdiction for civil matters that “arise under the United States Constitution,” rather than under federal law in general); Action Notice, *supra* note 26 (Recommendation 6 deferred).

205. See Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 1, 94 Stat. 2369 (eliminating the amount in controversy requirement then at \$10,000).

206. See, e.g., *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986); *American Nat’l Red Cross v. S.G. & A.E.*, 505 U.S. 247 (1992). See generally David Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985).

207. See, for example, the debate about whether a cause of action arises under state or federal law in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921); *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916); *Franchise Tax Bd. of California v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983).

208. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73. See Larry Kramer, *Diversity Jurisdiction*, 1990 B.Y.U. L. REV. 97 [hereinafter Kramer, *Diversity Jurisdiction*].

209. Frank, *Historical Bases of the Federal Judicial System*, *supra* note 189, at 16 (Table 1).

the simplest types of commercial and property disputes.”<sup>210</sup> Yet that is a piece of history from which many federal judges (and others) are happy now to depart.<sup>211</sup> Given that diversity jurisdiction has an impeccable historical pedigree<sup>212</sup> and is a caseload staple of the federal courts,<sup>213</sup> the judicial proposals to eliminate or radically restrict federal diversity jurisdiction make plain that selected excerpts are the guiding premises, and not historical practice alone.

Another example of excerpted history comes from considering what is missing or obliquely referenced in the Long Range Plan’s list of categories: federal court jurisdiction to enforce individual rights and liberties as articulated by Congress rather than based in the Constitution.<sup>214</sup> Federal statutory rights enforcement has a long tradition. The

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210. *Id.* at 18.

211. *See supra* note 39 and accompanying text.

212. Here is an example of multiple ways to tell history. Above, I note that diversity has been a bedrock of federal court jurisdiction. In contrast, Professor Kramer argues, that unlike “other facets of federal jurisdiction [that] have steadily expanded over the last century, diversity has been consistently restricted.” Kramer, *Diversity Jurisdiction*, *supra* note 208, at 102 (footnote omitted).

213. For data on quantity of diversity jurisdiction, see Kramer, *Diversity Jurisdiction*, *supra* note 208, at 99 (in 1988, diversity cases were almost 29% of the civil trial docket); David Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 127, 134, 146 (1981) (in 1947, about 13% of the terminated civil cases were based on diversity and, excluding cases to which the United States was a party, diversity cases comprised about 30 percent of the civil docket; in 1954, almost 29% of the terminated civil cases were based on diversity and, excluding government cases, diversity was 45%; in 1967, roughly 28% of the civil cases were diversity and again excluding government cases, diversity was 42%; in 1980, almost 22% of the civil cases were diversity, and, excluding government cases, about 35% of the civil terminated caseload); Frank, *Historical Bases of the Federal Judicial System*, *supra* note 189, at 16-17 (from 1790 to 1815, of a total of 434 cases in the Supreme Court, 31%, were diversity and of 647 cases in the circuit courts, almost 57% were based on diversity). Another analysis of the docket, considering the caseload by kinds of cases including tort and contract cases based on diversity comes from Marc Galanter, *The Life and Times of the Big Six: Or, The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 924-28, 936-46 (describing complex pattern of filings, with many causes not readily captured in much of contemporary discussion) [hereinafter *Federal Courts Since the Good Old Days*].

214. Arguably such legislation is comprehended in the reference to federal jurisdiction when the “issues presented cannot be dealt with satisfactorily at the state level and involve either (1) a strong need for uniformity or (2) paramount federal interests.” 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 27-28 (Recommendation 6(b)); Action Notice, *supra* note 26 (Recommendation 6, deferred).

post-Civil War civil rights statutes — enacted in 1871 and now codified at 42 U.S.C. sections 1981, 1983, and 1985 — are central illustrations.<sup>215</sup> During this century, Congress has provided civil rights protections for prisoners,<sup>216</sup> the aged,<sup>217</sup> victims of gender-based violence,<sup>218</sup> and insisted on rights of access for the disabled,<sup>219</sup> as well as required fair treatment in housing,<sup>220</sup> employment,<sup>221</sup> and education.<sup>222</sup> Such legislation might be characterized as deeply etched in our history and understood as definitional moments for the federal courts or, alternatively, conceived as occasional measures not central to the federal court mission.

For example, this aspect of federal jurisdiction could be stressed as a default position, that federal court engagement comes after state failures. Congressional creation of one major federal civil rights

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215. Act of May 31, 1870, ch. 114, § 16, 16 Stat. 140, 144 (codified as amended at 42 U.S.C. § 1981 (1988)); Act of April 20, 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1983, 1985(3) (1988)); *see also* Act of April 9, 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1982 (1988)). For discussion of this aspect of federal jurisdiction, *see* Fraenkel, *supra* note 81, at 132; *see also* Neuborne, *supra* note 174, at 1105; William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM. J. LEGAL HIST. 333 (1969) (discussing the congressional expansion of federal courts' jurisdictional powers in the 1860s and stressing the import of removal jurisdiction).

216. Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified at 42 U.S.C. § 1997a (1988)); revised habeas corpus provisions, *see* Act of Sept. 19, 1966, Pub. L. No. 89-590, 80 Stat. 811 (codified at 28 U.S.C. § 2241 (1994)); Act of Nov. 2, 1966, Pub. L. No. 89-711, § 2, 80 Stat. 1105 (codified at 28 U.S.C. § 2254 (1994)).

217. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. § 621 (1994)).

218. Violence Against Women Act of 1994, Pub. L. No. 103-122, § 40302, 108 Stat. 1941 (codified at 42 U.S.C.A. § 13981 (West Supp. 1995)).

219. Americans with Disability Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (Supp. IV 1992)); Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 (1970) (codified as amended at 20 §§ 1400-1491a (1994)).

220. Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3631 (1988)).

221. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000 *et seq.*).

222. *See* Equal Educational Opportunity Act of 1974, Pub. L. No. 93-380, Title II, 88 Stat. 514 (codified at 20 U.S.C. § 1701 (1994)); Women's Educational Equity Act of 1978, Pub. L. No. 95-561, 92 Stat. 2298 (codified at 20 U.S.C. § 3341 (omitted 1994)).

remedy (today's § 1983) occurred after the Civil War; Congress viewed state actors as themselves engaged in the violation of federally-recognized rights.<sup>223</sup> Other civil rights statutes, such as those protecting state prisoners' rights of habeas corpus, expressly require that litigants go first to the state courts to exhaust remedies prior to turning to the federal courts<sup>224</sup> — thereby demonstrating that federal court action is only called for after state courts have failed in some respect. Alternatively, one might stress those pieces of federal civil rights legislation that do not require demonstration of states' failures as a predicate to federal court activity as evidence of a general federal interest, or more accurately, of the ability of a particular set of social forces to obtain sufficient political interest and clout as to create federal legislation.

Let me pause to summarize. Above, I detailed how jurisdictional history is itself varied and complex, supporting a range of claims rather than operating effectively as a constraint. I have now outlined that, when history is claimed to be a guiding principle, proponents of particular visions of federal court jurisdiction are selective, disowning certain traditions and embracing others. Of course, federal judges sit awkwardly as policy makers when they write about the future of the federal courts. Invoking history is in part prompted by a desire to find a "neutral" space, to draw principles from practice, to avoid the appearance of making normative judgments. But there is no escape from the normative work entailed in selecting among historical practices.<sup>225</sup>

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223. Readings of this legislative history are presented in *Monroe v. Pape*, 365 U.S. 167 (1961) and in *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

224. 28 U.S.C. § 2254(c) (1994).

225. That the scope of federal court jurisdiction reflects political judgments is not a novel insight. See, e.g., Fallon, *Comparing Federal Court "Paradigms"*, *supra* note 53, at 7; Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1031 (1981) (the constitutional compromise was that access to lower federal courts was an issue not to be "answered as a matter of constitutional principle, but rather, should be left a matter of political and legislative judgment"). Thus, those advising Congress on how and when to exercise its authority over federal court jurisdiction are offering their political judgments about when to deploy life tenured judges. A parallel question exists relating to states' immunity from congressional intervention, and answers (such as requiring extra justification prior to such congressional action) rely on similar political judgments

C. *When Tradition Does Not Much Serve: The Inventions of the Twentieth Century*

Yet another difficulty with relying on historical jurisdictional practices is what to do when the context changes. While one of the premises of the Long Range Plan is that federal courts should be “reasonably accessible” courts of general jurisdiction,<sup>226</sup> the Plan also proposes divesting the federal courts of jurisdiction over certain kinds of disputes and reassigning them to federal agencies. Included are cases involving federal benefits or regulation, and thus cases in which claims are made against the federal government.<sup>227</sup> Further the planners recommend that, “where possible,” agencies be permitted to “achieve final resolution of disputes within their jurisdiction.”<sup>228</sup> Aware of the

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about the allocation of authority.

A dissenter to the effort to develop normative theories of federalism argues that instead of focusing on the indeterminate utility of federalism, federalism should be respected because of the formal, legal creation of states as lawmaking units. *See* Briffault, *supra* note 200, at 1317-44.

226. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 47 (Recommendation 25); Action Notice, *supra* note 26 (Recommendation 25 deferred); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 39 (Recommendation 23).

227. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 33 (Recommendation 10); Action Notice, *supra* note 26 (Recommendation 10, deferred). Also recommended to be divested are cases involving “work-related personal injury actions,” federal ERISA benefits claims, and other workplace injury litigation. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 34-35 (Recommendation 12); Action Notice, *supra* note 26 (Recommendation 12, deferred). The proposal provides that cases that “involve the federal government, federal officials, or agencies as plaintiffs or defendants” would be properly within federal civil jurisdiction; 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 28 (Recommendation 6(d)); Action Notice, *supra* note 26 (Recommendation 6 deferred).

Reading the recommendations together, a subset of the government-a-party cases, including those involving workplace relations, employment-related claims, and federal benefits are carved out for reassignment to agencies or other Article I courts. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 33 (Recommendation 10); Action Notice, *supra* note 26 (Recommendation 10 deferred). The 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 28-29 (Recommendations 9, 11), made similar proposals. The FEDERAL COURTS STUDY COMMITTEE REPORT, *supra* note 23, at 55-58, had also recommended increasing non-life tenured judges’ powers in the context of disability claims and elsewhere.

228. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 32-33 (Recommendation 9b); Action Notice, *supra* note 26 (Recommendation 15 deferred); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 27 (8b); *see also* FEDERAL COURTS STUDY COMMITTEE

acute workload crisis at the agency level, the planners condition implementation of their recommendation upon the proposing of "adequate funding" as well as augmenting the ability of agencies to employ alternative dispute resolution methods.<sup>229</sup>

Many of these cases involve what are termed "public rights."<sup>230</sup> This term derives from the premise that, if Congress creates a right, Congress also has broad authority to shape the mechanisms by which to redress alleged deprivations of that right, including vesting adjudicatory authority in decisionmakers not garbed in the constitutional protections of life tenured federal judges. Under this approach, the Supreme Court has upheld the power of the Occupational Safety and Health Review Commission to impose monetary sanctions; the Court held that alleged violators of such regulations have no right to a jury

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REPORT, *supra* note 23, at 55 (calling for a "new Article I Court of Disability Claims, with review in the courts of appeal limited to constitutional claims and to pure issues of law").

229. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 33 (Recommendation 9b, explanatory text); Action Notice, *supra* note 26 (Recommendation 9 deferred). The parallel recommendation in the previous draft did not impose this condition. 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 28.

230. The terminology stems from the nineteenth century and somewhat ironically, from a case not about rights but about what was then considered (and soon may be again) "privileges." In *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 18 How. 272 (1852), the Solicitor of the Treasury had ordered collection against a customs collector for the Port of New York, whose accounts were audited. Upon execution and the sale of the debtor's property, the debtor argued that an Article III judge, rather than an executive branch official, should have been the decision maker. The Supreme Court concluded that, since the citizenry had no judicially cognizable right to such a decision, the executive was free to make its decision in any way it wished. *Id.* at 284 ("there are matters, involving *public rights*, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper") (emphasis added). The reasoning was that, since it "depends upon the will of congress whether a remedy in the courts shall be allowed at all," the Congress was also free to "prescribe such rules of determination as they may think just and needful." *Id.*

In the 1930s, the Court relied on *Murray's Lessee* to uphold substantial delegation by Congress to non-Article III decisionmakers under the Longshoremen's and Harbor Worker's Compensation Act. *See Crowell v. Benson*, 285 U.S. 22, 50 (1932). While acknowledging in *Crowell* that the dispute was between an employer and employee, and hence a "private right, that is, of the liability of one individual to another under the law as defined," the Court concluded that like *Murray's Lessee*, Congress could delegate some of the decisionmaking — in this instance to commissioners — as long as the life tenured judiciary continued to have the power to determine jurisdictional facts de novo. *Id.* at 51, 62-63.

trial because Seventh Amendment protections do not attach to congressional remedial schemes.<sup>231</sup> In several other cases contesting the authority of non-life tenured judges, the Court has relied on the category “public rights” (variously defined<sup>232</sup>) to approve the location of adjudication outside the Article III judiciary.<sup>233</sup>

Proposals like those from the Long Range Plan — calling for “intensive fact-finding” by agency officials<sup>234</sup> — implicitly recognize the completion of the transformation of agencies into courts. These proposals also assume the propriety of sending a segment of citizen litigation, much of it against the government, to judges who are by definition more dependent on the government than is the Article III judiciary. While the Long Range Plan calls for increased resources for agency judges,<sup>235</sup> the Plan does not seek a major reformation of the

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231. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 455 (1977).

232. For statements that the category of public rights is defined as cases to which the federal government is a party, see *Atlas Roofing*, 430 U.S. at 450 (defining “public rights” cases as those in which “the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact”); *Granfinanciera, S.A., v. Nordberg*, 492 U.S. 33, 70 (1989) (Scalia, J. concurring) (“the public rights doctrine requires, at a minimum, that the United States be a party to the adjudication”). For statements describing a broader category of claims, including those involving litigation between private parties, see *Granfinanciera* 492 U.S. at (Brennan, J., for the majority) (federal government “need not be a party for a case to revolve around ‘public rights’”); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 585-89 (1985) (O’Connor, J., for the majority) (rejecting “formal categories” in which the “identity of the parties alone determined the requirements of Article III,” and citing many instances in which agency adjudication was upheld in litigation between private parties); *id.* at 593-94 (Brennan, J. concurring) (“Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary”).

233. See also *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 857 (1986) (upholding agency jurisdiction over a counterclaim in a broker-customer dispute and rejecting “bright-line rules” about when Congress can vest powers in non-Article III judges).

234. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 33 (Recommendation 10); Action Notice, *supra* note 26 (Recommendation 10 deferred); see also 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 33 (Recommendation 9(b); “The limited resources of the federal courts can be conserved, in part, by reducing court time devoted to fact finding and review of administrative determinations that often turn primarily on factual issues.”); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 27 (Recommendation 8(b)) (same).

235. See *supra* note 38.

administrative judiciary to alter its current stature as a post occupied by mid-level civil servants<sup>236</sup> and to enhance its prestige to better approximate that of the life tenured judiciary.<sup>237</sup>

How do such proposals square with the traditions of independence that are associated with life tenure? How do those proposals work, given that the relationship between judge and sovereign is one in which the judge must stand in judgment of the very power that licenses that judgment?<sup>238</sup> Both the jurisprudence of the Supreme Court and the ideology of the federal judiciary posit the Article III judge as specially situated. With constitutional life tenure and salary protection, Article III judges have some insulation from the need to

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236. Under the Office of Personnel Management regulations, administrative law judges, who used to be at grades GS-15 to GS-18, are now categorized as "AL-3, AL-2, and AL-1," depending on their qualifications and length of service. 5 C.F.R. § 930.210 (1995). Pay in 1994 for AL-3 employees ranged from \$78,018 to \$81,620 and for AL-1 employees ranged from \$120,027 to \$123,000. Locality Rates of Pay for Administrative Law Judges and Members of Boards of Contract Appeals, 60 Fed. Reg. 7360 (1995). Federal district judges were paid \$133,600 in 1994. 28 U.S.C. § 135 (1994) and Exec. Order No. 12,944, 60 Fed. Reg. 309 (1994). Bankruptcy and magistrate judges are paid 92 percent of what life tenured district judges are paid. *See* 28 U.S.C. § 153 (bankruptcy judges); 28 U.S.C. § 634 (magistrate judges) (1994). *See also infra* note 301 for a comparison of salaries between federal life tenured judges and state judges.

237. For proposals to enhance such stature, *see* Richard B. Hoffman & Frank P. Chihlar, *Judicial Independence: Can It Be Without Article III?*, 46 MERCER L. REV. 863, 878-81 (1995) (arguing that administrative judges need to "in fact be free of command influence," that is be outside the agency from which claims arise, as well as that qualification and selection methods need change). My own instinct is that the life tenured judge has the potential for imposing greater oversight of the government than does a career civil servant. Resnik, *The Mythic Meaning of Article III*, *supra* note 75; *see also* Reinhardt Statement, *supra* note 27, at 7 (one of the "primary effects of the Committee's recommendations would be to shift work now performed by Article III judges to non-tenured magistrate judges, commissioners, or administrative agencies. I strongly urge you to reconsider . . .").

Whether any judge is well situated to constrain national decisionmaking is a question of debate. *See, e.g.,* Eskridge & Ferejohn, *supra* note 199, at 1361-68, 1395-1400 (analyzing the institutional incentives of the United States Supreme Court justices as affecting the likelihood of overturning congressional judgments, and that federal courts do a more "consistent job" when "policing abuses by subnational units" — such as by states — rather than by the national government). Perhaps the suggestion by a segment of the life tenured judiciary that citizens with claims against the federal government have but very limited access to life tenured judges illustrates their point.

238. Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 177, 183-97, 202 (1985).



curry favor,<sup>239</sup> including with their employer, the federal government.<sup>240</sup> The rise of the administrative state and the recognition of “entitlements” are twentieth century artifacts, as is the creation and expansion of the administrative judiciary. What should be its purview as compared or contrasted or related to that of the life tenured judiciary? As currently framed, many proponents of increased agency authority argue for administrative judges to control the facts, and life tenured federal judges to have some review of law. To assess the wisdom of this proposed solution, historical practices of the allocation of authority among state and federal judges offers little illumination. Once again, we are required to make choices based on normative visions of desirable allocation of judicial services.

#### V. A VARIETY OF VERSIONS OF “OUR FEDERALISM”

It is this normative enterprise that is constantly being undertaken, albeit often times in the guise of historical description. While in 1970, Justice Black invoked “our federalism” in his decision for the Court in *Younger v. Harris*,<sup>241</sup> which in turn created a presumption against federal court intervention in pending state court proceedings,<sup>242</sup> the content of that federalism is constantly under debate.

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239. That insulation is not complete. See Laura E. Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 AM. U. L. REV. 699 (1995) (discussing the underpinnings of reciprocal relationships and their potential effects on judgment).

240. The dominant “repeat player” is the federal government. In 1993, about a quarter of the federal civil docket were cases to which the federal government was a party. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1993 JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR, L. RALPH MECHAM, at AI-54 (Table C-2) (1994) (of 229,850 civil suits filed in 1993, 20,482 included the U.S. as plaintiff, and 31,242 included the U.S. as defendant, representing 23% of the docket). The 1993 data represent a 17% drop from 1992, largely due to decreases in veterans’ benefits actions and student loan default actions. *Id.* at 7. In 1994, filings of civil cases involving the United States declined and comprised about a fifth of the docket. 1994 AO REPORT, *supra* note 13, at A-24 (Table C-2). As explained by the Administrative Office, student loan filings declined because of legal changes permitting wage garnishment, and veterans benefit cases declined because of agency efforts to recover overpayments. 1994 AO REPORT, *supra* note 13, at 6.

241. 401 U.S. 37, 44 (1971).

242. Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1117-29 (1977).

One could tell a host of different stories about “our federalism” — that it is a creature with many and varying appearances, that it is the subject of invention and radical reformation<sup>243</sup> or of evolution and quiet alteration borne of periodic reassessments, that it reflects a good deal of consensus,<sup>244</sup> or that it has little current substantive content and is really about managing a large country.<sup>245</sup> One might tell a story that the states have disappeared in the sense that they no longer exist as vital centers of power and governance, but that we are so accustomed to assuming their presence that we cannot yet perceive their demise, or alternatively that states have remarkable vitality and stamina, given their endurance in the face of determined efforts at nationalization.<sup>246</sup> One might argue for states based on legal claims to their formal status as political units recognized in the Constitution.<sup>247</sup> One might make claims for state governance based on their capacities as “laboratories” generative of new rights or of educational and

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243. Ackerman & Katyal, *supra* note 172, at 569 (calling for a conception of the founders as “pioneers of an ongoing tradition of revolutionary reform”).

244. Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 77 (developing a “minimal model” of federal jurisdiction, based in part on the “areas of agreement [that] turn out to be surprisingly large”).

245. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994) (arguing that Supreme Court doctrinal claims for federalism are in fact arguments about decentralization of decisionmaking, that little evidence supports the claim that federalism diffuses power or that it supports, engenders, or reflects communities of affinity or value); *see also* Friedman, *supra* note 196, at 1472 (predicting that globalization will further erode state authority); Tushnet, *supra* note 183, at 1654-55 (“[g]lobalization of the economy is surely more important in determining what happens in the lives of residents of the United States than the intricacies of federalism doctrine.”).

246. Resnik, *Dependent Sovereigns*, *supra* note 3, at 747-58 (vitality of federal Indian tribes and of some forms of state governance suggest the possibility of federalism continuing to enable divergent norm development and authority); *see also* Eskridge & Ferejohn, *supra* note 199, at 1357-61 (disputing the conventional view that centralization is an inexorable force and calling for mechanism to maintain a “robust federalism,” in which state boundaries have political content); Ann Althouse, *Federalism, Untamed*, 47 VAND. L. REV. 1207, 1208-09 (1994) (while the Supreme Court’s deference to state interests could be understood as “little more than a strategy to exploit state courts, conscripting them to a national agenda,” federalism should be “untamed,” so that state courts can have an important “normative role . . . in the discourse concerning the meaning of rights.”).

247. Briffault, *supra* note 200, at 1344 (also arguing that most of the arguments made on behalf of federalism’s utility are arguments about the advantages of *local* governance and that such localism does not depend on the existence of states but could be provided instead by municipalities).

participatory opportunities,<sup>248</sup> as enablers of affiliations to governments borne from proximity,<sup>249</sup> as useful or limited competitors,<sup>250</sup> as autonomous centers of governance that provide at least some choice of if not a vast diversity of rules,<sup>251</sup> or as co-conversationalists in norm development.<sup>252</sup> One might argue instead for duality itself, based on the view that two governments protect individual liberty more than does one.<sup>253</sup> Alternatively, one might perceive the state courts as “wrongdoers” often in need of federal superintendence.<sup>254</sup>

Note that underlying these various approaches are assumptions about that which needs to be explained — either the state or the federal system. While in the 1950s, Herbert Wechsler and Henry Hart posited the states and thus their courts as the central bodies of law making and both federal law and federal courts as “interstitial,”<sup>255</sup>

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248. Amar, *Five Views*, *supra* note 172, at 1233-36, 1240-46 (distinguishing as two views of federalism, one that posits the states as laboratories for experimentation in an empirical sense and for education and citizen participation, and a second — related — claim that the states serve to safeguard rights and to provide additional protection for citizens. This second view is tied to both the writings of Herbert Wechsler and to Justice William Brennan, while Justices Frankfurter and O'Connor are associated with the first; *see also* Andrew Rapczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 SUP. CT. REV. 341, 380-88.

249. GRODZINS, *supra* note 2, at 383-84. Grodzins also distinguishes this claim from one based on participation in government, in part by noting low voting rates in local elections. *Id.* at 198.

250. Amar, *Five Views*, *supra* note 172, at 1236-40 (discussing both horizontal and vertical competition, among states and against the federal government); Lucian Ayre Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1437-42 (1992) (arguing for “substantial expansion of the role of federal law” because of failures in state competition in certain areas).

251. Merritt, *supra* note 172, at 1573-75 (arguing that state autonomy serves as a check on federal government powers, diversifies the participants in government, and offers some programmatic alternatives).

252. Various formulations on redundancy and duplication as virtues are provided in Robert M. Cover & T. Alexander Alienkoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 630 (1981) [hereinafter Cover, *The Uses of Jurisdictional Redundancy*]; ELAZER, *supra* note 7, at 30-32.

253. Amar, *Five Views*, *supra* note 172, at 1248. *But see* Briffault, *supra* note 200, at 1323 (questioning the bases from which to assume that such duality of governance creates more freedom).

254. YACKLE, *supra* note 174, at 44.

255. The 1953 edition of the casebook evidences this approach. HART & WECHSLER,

many of the 1990s legal narratives on federalism take as their burden to explain the ongoing authority of states.

The issue of federal court jurisdiction is a subset of the general question of federalism, and whatever overall picture of federalism is chosen is then reflected in the tasks permitted the federal courts.<sup>256</sup> The federal judiciary's long range planners remain loyal to the *Hart & Wechsler* assumption of state court prominence; state court judicial authority is the baseline, and the burden of proof is placed on Congress to explain why to give federal courts jurisdiction. The judiciary also remains loyal to the premise of dichotomous choices, of state *or* federal court action rather than forms of collaboration, parallel to those ascribed by political scientists to other branches of United States government.<sup>257</sup>

What are the aspects of the varying narratives that I want to stress here, in the context of considering the specific problem of federal court jurisdiction? First, while historical practices suggest that federal court jurisdiction has always been limited as compared to that of the states, history provides little basis for saying much about what areas of litigation *cannot* be entrusted by Congress to the federal courts. More than that: jurisdictional history may well be the basis for an argument that federal courts are (almost) courts of unlimited jurisdiction. Absent wholesale revision of both *Wickard v. Filburn*<sup>258</sup> and (the wonderfully

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1ST ED., *supra* note 60. See also Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

256. As noted, one of the major 1995 federalism opinions, *United States v. Lopez*, is about just that: the constitutionality of granting federal courts jurisdiction when crimes are prosecuted involving gun possession near a school. Given the federal judicial distress at the "federalization of crime," the federal judiciary had particular interest in the outcome of *Lopez*, and the Chief Justice's opinion for the Court referred negatively to the specter of federal regulation of other activities related to economic life with the concomitant commitment of federal judicial resources. 115 S. Ct. 1624, 1632 (1995) (arguing that under the government's reasoning in support of the legislation, "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example"); see also *supra* note 194 and accompanying text (detailing federal judicial opposition to the Violence Against Women Act).

257. See, e.g., GRODZINS, *supra* note 2, *passim*. Several case studies of shared work, defined as sharing decision making, sharing responsibility, or sharing influence. *Id.* at 11.

258. 317 U.S. 111, 129 (1942) (upholding agricultural regulations under the interstate

named) *Heart of Atlanta Motel*,<sup>259</sup> Congress has assumed the authority to confer jurisdiction on the federal courts over a broad array of issues.

It is possible to read the Supreme Court decision of *United States v. Lopez*<sup>260</sup> as just such a revision.<sup>261</sup> Certainly some of the justices seem prepared to limit congressional authority to use Commerce Clause powers over states.<sup>262</sup> The lower court cases now emerging demonstrate the many federal statutes thrown into question by possible readings of *Lopez*. While the first batch of cases suggests that many federal statutes will survive *Lopez*,<sup>263</sup> one set of derivative lower court opinions illustrate the problems with essentialist federalism and the attraction some jurists have for it. At issue is the congressional authority to confer federal court jurisdiction in the 1992 Child Support

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commerce power because even "wheat consumed on the farm where grown," if left unregulated, could affect trade regulation).

259. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964) (despite the "local character" of the motel, Congress' interstate commerce authority can reach such businesses).

260. 115 S. Ct. 1625 (1995).

261. *But see* Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 34, 36, 37, 44 (1995) (arguing that *Lopez* is "a perfect example not of revolution," that it continues to "recognize the breadth of the commerce power," that the Court "both adhered to and refreshed tradition" in its opinion, and that the majority rejected a return to a "governmental functions" test); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 901 (1995) (arguing that *Lopez* should not be read as a "break with prior decisions" but rather as a "constitutional 'wake up call'" — that Congress must operate within constitutional parameters).

262. *See* Kathleen M. Sullivan, *Comment: Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 106-07 (1995) (suggesting that Justice Thomas would do so and noting Justice Kennedy's inclinations toward narrowed federal powers). Other limitations on federal judicial power also come from the current Court. *See, e.g., Missouri v. Jenkins*, 115 S. Ct. 2038 (1995).

263. *See, e.g., Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995); *American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir. 1995), and *United States v. Lucero*, 895 F. Supp. 1421 (D. Kan. 1995) (all upholding the constitutionality of the Freedom of Access to Clinics Entrances Act, 18 U.S.C. § 248 (1994)); *United States v. Pelkey*, 61 F.3d 914 (9th Cir. 1995) (upholding a firearm statute, 18 U.S.C. § 922(g)(1) (1994)); *United States v. Green*, 62 F.3d 1418 (6th Cir. 1995) (upholding the carjacking statute, 18 U.S.C. § 2119 (1994)). *Compare* *United States v. Wilson*, 880 F. Supp. 621 (E.D. Wis. 1995) (dismissing an indictment under the Freedom of Access Act based on view that it exceeded congressional power), *rev'd by* *U.S. v. Wilson*, No. 95-1871, 1995 WL 76540 (7th Cir. 1995).

Recovery Act,<sup>264</sup> making it a federal crime for a parent to fail to pay child support payments to children residing in states other than that of the parent. Some judges claim that family law issues belong to states, not to the federal government.<sup>265</sup> Others recall an era when insurance law was deemed to be "local," and conclude instead that a debt is a debt, commercial in nature and subject to Commerce Clause control once it moves interstate.<sup>266</sup>

The Supreme Court's interest in *Lopez* in invoking constitutional limitations on federal jurisdictional power is linked to "devolution," the "returning" to the states of control over welfare policy and a host of

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264. 18 U.S.C. § 228 (1994).

265. See, e.g., *United States v. Parker*, \_\_\_ F. Supp. \_\_\_, No. Crim. 95-352, 1995 WL 683215 (E.D. Pa. 1995) (holding the CSRA unconstitutional in part because the debt is owed to family members, "defined by state law," and not to "arms length commercial actors," that traditionally family law has been under state control); *United States v. Mussari*, 894 F. Supp. 1360, 1362-68 (D. Ariz. 1995) (appeal pending) (finding CSRA unconstitutional and relying in part on *Lopez* to conclude that, although the statute only applied if a child and parent were living in different states, interstate commerce was not affected by parents delinquent in child support payments, in part on the view that because most states had relevant legislation, "[t]o allow Congress to pass a national criminal statute addressing this issue would usurp the authority of those States" that had not criminalized failures to pay, and in part on the Tenth Amendment); *United States v. Bailey*, 902 F. Supp. 727, 729-30 (W.D. Tex. 1995) (concluding that the CSRA "sounds, walks, and looks like a domestic relations statute and aims the central government down a slippery slope where it should not be" and arguing that the federal courts should not become "embroiled in state family law matters"); *United States v. Schroeder*, 894 F. Supp. 360 (D. Ariz. 1995) (finding that the CSRA is an unconstitutional infringement on the liberties of people and on states' internal ordering).

266. *United States v. Hopper*, 899 F. Supp. 389, 393 (S.D. Ind. 1995) (magistrate judge decision, objections to the district court filed Dec. 5, 1995) (making the analogy to arguments about whether insurance contracts were "local" obligations and concluding that "collection of child support orders across state lines does involve a continuous and indivisible stream of intercourse among the states involving the transmission of large sums of money and communications by mail, telephone and telegraph;" also relying on the Supreme Court's decision in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), that the domestic relations exception to diversity jurisdiction was not a constitutionally-based exception to federal jurisdiction); *United States v. Hampshire*, 892 F. Supp. 1326 (D. Kan. 1995) (upholding the CSRA, also relying on *Ankenbrandt* to refuse to abstain); *United States v. Murphy*, 893 F. Supp. 614, 616 (W.D. Va. 1995) (concluding that *Lopez* "does not prohibit Congress from enacting laws aimed at regulating the use of interstate travel as a means by which to avoid the legal obligations arising from family responsibilities"); *United States v. Sage*, \_\_\_ F. Supp. \_\_\_, 1995 WL 627950 (D. Conn. 1995) (upholding the CSRA as based on activities with a sufficient interstate nexus).

other issues.<sup>267</sup> At the moment, a majority of the justices on the Supreme Court, like a majority of the 1995 Congress, are committed to a political vision of the United States with sharply reduced federal government roles, at least on certain issues.<sup>268</sup> Indeed, the *Lopez* approach accomplishes by constitutional interpretation what some federal justices and judges have been unable to do by persuasion: limit federal court criminal jurisdiction and provide the basis to limit civil jurisdiction over what is styled “family law.”<sup>269</sup>

But the categorical line drawing does not work. In terms of family law, a host of federal laws — tax, immigration, bankruptcy, and pension, for example — define and affect the structure of families and their economic interactions;<sup>270</sup> federal tax policy creates incentives for certain kinds of family arrangements and discourages others,<sup>271</sup> and few would argue that federal courts should jettison jurisdiction over these statutes. While some federal judges may not want what they term “domestic relations” to be within their ken, Justice Breyer’s dissent in *Lopez* has the better of the argument.<sup>272</sup> Issues related both to

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267. See Vicki C. Jackson, *Cautioning Congress to Pull Back*, LEGAL TIMES OF WASHINGTON, July 31, 1995, at S31.

268. Compare efforts to create a national law on products liability. See, e.g., The Common Sense Legal Standards Reform Act of 1995, H.R. 956, 104th Cong., 1st Sess. (Version 7, Mar. 16 1995) (proposing liability rules for products, statutes of limitations, and defenses).

269. See note 194 *supra*, discussing federal judicial opposition to the Violence Against Women Act’s jurisdictional provisions; see also Judith Resnik, “Naturally” Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682, 1685-94, 1749-50 (1991) (describing federal judicial reluctance to undertake studies of the effects of gender as had state court judges, and linking that reluctance to a federal judiciary’s self-conception that it had less involvement with family law issues, which are themselves gender-coded, than did state court judges) [hereinafter Resnik, *Women, Jurisdiction, and the Federal Courts*].

270. See Resnik, *Women, Jurisdiction, and the Federal Courts*, *supra* note 269 (federal court authority over issues relating to family matters is longstanding); Cahn, *supra* note 194, at 1075 (arguing that the “domestic relations” exception to diversity jurisdiction is not supported by “persuasive rationale[s]” and that federal courts should exercise jurisdiction over these cases to help make plain that “families are a national issue”), at 1102-08 (surveying family law issues currently falling within federal jurisdiction).

271. Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 987 (1993) (detailing federal taxation’s affects on “everyday life” and the types of families fostered and discouraged).

272. 115 S. Ct. 1624, 1657, 1659-62 (1995) (Breyer, J., dissenting).

education and to children have long been a part of national economic policy, thereby forming the basis for federal jurisdiction — should Congress so desire. Whatever today's political and legal interpretations of congressional powers, federal jurisdictional authority is very broad, edging toward the limitless.

Second, in light of the increasing appreciation for the overlap between state and federal jurisdiction and the need to act in concert, it is unwise to link permissible exercises of congressional enlargement of federal jurisdiction to the concept that certain issues "cannot be dealt with satisfactorily at the state level."<sup>273</sup> As an empirical matter, on certain issues with political freight (such as abortion, affirmative action, or fighting particular forms of crime), one would expect variation among states. In some instances, local enforcement of federal rules may fail either because of problems of resources or of will, while in other states, political authorities may embrace protections equal to or beyond what federal law requires. On other issues, the inability to deal satisfactorily with such issues might stem from the interjurisdictional nature or effects of problems, but as I develop below, options exist for inter-jurisdictional structures other than the federal courts.<sup>274</sup>

As a theoretical matter, commentary about reliance on either state or federal jurisdiction often assumes an oppositional set of choices rather than cooperative avenues of shared work. As a political matter, in the contemporary world of impoverished judicial resources and increasing appreciation of "judicial federalism," it is unappealing to invite negative commentary by Congress about the states as a predicate to investing the federal judiciary with new authority. Of course, such a statement would also make some members of Congress uncomfortable; to the extent they continue to perceive themselves as significantly state-identified,<sup>275</sup> calling for indictments of the states as a predicate to

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273. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 27-28 (Recommendation 6(b)); Action Notice, *supra* note 26 (Recommendation 6 deferred); *see also* Little, *supra* note 13, at 1077-81 (attempting to craft such a principle without its pejorative implications and based either on intentional state failures that might be disputed or lack of resources and capacities to respond to issues of interstate dimensions).

274. *See infra* Section VII A.

275. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV.



federal jurisdiction would likely damp down the creation of new federal causes of action.

A third and related point is that I hope discussants of the federal courts will move away from explicit and implicit references to the “essential” meaning of state or federal governments.<sup>276</sup> Let me here offer analogies from other debates within critical race theory and feminism about the “essential” meaning of race and of gender. Essentialist assumptions, that race or gender carries particular characteristics, turn out to be deeply linked to culture, both in the identification of certain characteristics as tied to race and gender and in the ability to perceive those characteristics as telling.<sup>277</sup> Similarly, efforts to fix the private/public distinction reflects an array of social perceptions about arenas of life, rather than one enduring line.<sup>278</sup>

Placing these parallels in the context of the federal courts, I suggest that our understanding of federal and state jurisdiction should recognize the necessarily fluid and changing understandings of federal and state boundaries, that neither federal nor state jurisdiction need be what it has or has not been before. Note that this is not a blanket rejection of invocation of historical practices; indeed, I rely on past choices of enlarging jurisdiction, but do so without claiming that those or other historical practices have a presumptively special status among arguments for or against jurisdiction. To be clear on the implications,

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543 (1954) (Wechsler made that assumption, which has now been challenged); *see also* Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 857-68 (1979) (structural and political changes have made state-elected national officials more identified with the national government than state-affiliated). *But see* Kramer, *Understanding Federalism*, *supra* note 199, at 1529-46 (weak national parties and reliance on local administration support state-based affiliations).

276. Here, Kramer makes a related point, that to the extent federalism is driven by efforts to locate governance about issues in a manner that is most beneficial “for the people” federalism’s answers are deeply embedded in contextual judgments and “[T]he optimal level at which to do things depends on complicated circumstances that change over time.” Kramer, *Understanding Federalism*, *supra* note 199, at 1500.

277. *See generally* RUTH FRANKENBERG, *THE SOCIAL CONSTRUCTION OF WHITENESS* (1993).

278. *See* Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992) (outlining both the challenges to the distinction and criticisms of those approaches); *see also* Cahn, *supra* note 194, at 1101-15.

my suggested non-essentialist approach provides no safe havens for particular parts of the federal jurisdictional mandate that one likes, be they diversity, federal family law, or civil rights jurisdiction. Advocacy for forms of jurisdiction needs to be predicated on normative claims — whether about the need for national lawmaking, the desirability of providing life tenured judges, the importance of continuing particular aspects of federal or state court jurisdiction, the value of deferring to state court jurisdiction, the enforcement of federal rights by a specialized judiciary, the utility of adding resources like the federal courts, the hostility of other government officials, or the importance of keeping a preserve of special judges insulated from particular kinds of problems. Then the focus of disagreement can rest on the adequacy of these justifications, rather than on a claim that no justification is needed because one is treading down well-marked paths.

My non-categorical conception carries with it a skepticism I want to make explicit — about the capacity of scholars to offer singular justifications or unified theories about the value of either the invocation or abandonment of federal court jurisdiction. I am enthusiastic about and have benefitted from those scholars who offer structural approaches to federalism;<sup>279</sup> what I am leery of are efforts to sift the meaning down to a simple core that endures over time. Abandoning a categorical approach to state and federal judicial capacities entails acknowledging that sometimes one or the other may be champions of whatever precept is close to a particular scholar's heart, be it individual liberty, community authority, or something else. For example, a commitment to expansion of individual liberties does not inhere in the designation "state" or "federal" but in the positions that either or both sets of governments might undertake.<sup>280</sup> More-over, under a non-categorical view, states are also not a singular unit to be compared as a

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279. See, e.g., Fallon, *Ideologies*, *supra* note 172; Amar, *Five Views*, *supra* note 172; Merritt, *supra* note 172; Briffault, *supra* note 200; Kramer, *Understanding Federalism*, *supra* note 199; Eskridge & Ferejohn, *supra* note 199; Rubin & Feeley, *supra* note 245.

280. Compare Eskridge & Ferejohn, *supra* note 199, at 1360-68, 1395-99 (effort to provide a structural descriptive theory of when federally-empowered judges will overrule Congress or police "subunits," that is the states). See also PELTASON, *supra* note 107, at 3-6, 24-28, 65 (arguing for the legitimacy of seeing federal judges as self-interested politically-situated actors).

whole to the federal government but rather understood as likely to evidence diverse attitudes.<sup>281</sup> Further, the ongoing workings of federalist arrangements are understood as continually renegotiated.

Fourth, to the extent that state and federal systems have been discrete entities, I hope debates about federal jurisdiction will recognize the decreasing plausibility of the concept of bounded state and federal governance. Participants within — judges, lawyers, legislators, and residents — are actively engaged in eroding such boundaries.<sup>282</sup> From legislative grants of aid (conditioned on particular actions by states) to state and federal judges convening both sets of courts simultaneously, the experience of interdependence is enacted and reiterated.<sup>283</sup>

What is emerging will be very difficult for those trained in law within contemporary contexts (myself included of course) to understand. The physical and material boundaries that are explicitly the

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281. In this sense, I share some sympathy with Briffault's critique that normative federalisms — justifications based on claims of what federalism accomplishes — are an amalgam of historical example, empiricism, intuition and aspirations and thus unsatisfactory. Briffault, *supra* note 200, at 1324-28. Briffault's proposed solution, however, that states and federalism exist based on constitutional stipulation, fails to solve the problem that has prompted the search for normative justification — that having said that states exist as a legal matter does not answer what degree of national governance is permissible, even in constitutional doctrinal terms, let alone in terms of contemporary needs. Briffault did not purport to answer all those questions but argued that, when faced with such questions, courts should examine "the impact of national action on the capacities of the states to be independent lawmakers and alternative power centers within the federal framework, rather than by a more open-ended and value-laden assessment of the conflicting political values said to be advanced or impaired by state or national action." *Id.* at 1352. The difficulty is that the very assessments for which Briffault called are themselves "open-ended and value-laden." *Id.* The point is that there is no escape from that activity, which should I believe, be cast in less pejorative terms.

282. Compare Briffault, *supra* note 200, at 1336-38 ("territorial integrity" of states and its stability, that is very few boundary changes). That states have fixed boundaries does not make such boundaries determinative of how judicial systems should operate.

283. In a speech, Justice O'Connor used the metaphor of a "marriage" to describe the state-federal relationship, which she characterized as a system of "dialogue and dependence." Sandra Day O'Connor, Keynote Speaker, *Middle Atlantic Conference*, *supra* note 122, 162 F.R.D. 180, 182 (1994) ("Each partner must depend on the other to uphold its solemn obligations with respect to federal rights; each partner must have appropriate respect and regard for the other; and each partner must listen to and appreciate the views the other brings to bear on the issues they must, by the necessity of their marriage, address in common."). That image does not convey the blurring boundaries I wish to stress here.

core of a good deal of jurisdictional doctrine — land, in nineteenth century terms — are losing their relevance. Let me pause to underscore the disjunction between the history of jurisdiction and the changing roles of state and federal governments, occasioned in large measure by technological developments.

Remember the intellectual breakthrough of the 1940s and 1950s,<sup>284</sup> that jurisdiction over the person was a concept distinct from the ability to serve a person physically within one's borders. Until about 1950, a literal physical nexus to the person (sometimes in the fictive form that the person had designated a state official to act as that person's "agent" to receive process within the boundaries of the state) was the *sine qua non* of jurisdictional power. A government within the United States could not, absent consent, invoke its power over a person without this material, embodied relationship.

Physical authority is not only a relic of old jurisdictional rules; territoriality remains a vital part of contemporary jurisdictional law. In 1990, the United States Supreme Court concluded that, when a person is served within the boundaries of a state, jurisdictional authority is proper, no matter the relationship between that person and the state.<sup>285</sup> Federal admiralty and maritime jurisdiction are similarly keyed to place.<sup>286</sup> Further, on the criminal side, physical presence remains the touchstone; the absent defendant cannot generally be tried.<sup>287</sup> And the coordinate point is that physical authority can permit

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284. See *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950), and *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

285. *Burnham v. Superior Court*, 495 U.S. 604 (1990).

286. Location is not the exclusive basis but a factor to be considered. See *City of Chicago v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043, 1048 (1995) (Souter, J. for the majority) (determining that admiralty jurisdiction under 28 U.S.C. § 1331(1) involving tort claims "must satisfy conditions both of location and of connection with maritime activity"); compare the opinion by Justice Thomas, joined by Justice Scalia, arguing that the jurisdictional inquiry should be limited to the "simple question whether the tort occurred on a vessel on the navigable waters." *Id.* at 1056. See also *Executive Jet Aviation Inc. v. City of Cleveland*, 409 U.S. 249 (1972) (litigation about a plane that falls into Lake Erie not within admiralty jurisdiction because the "wrong" did not "bear a significant relationship to traditional maritime activity").

287. Linked to the Sixth Amendment's confrontation clause and right to defend guarantees as well as to due process concerns, Rule 43 of the Federal Rules of Criminal Procedure

trial; not only does the ability to compel extradition serve the requirement of physical presence but jurisdiction by kidnap is also expressly permitted under Supreme Court constitutional interpretation.<sup>288</sup>

In short, territoriality and physicality — material moments in water, air, and land — are centerpieces of jurisdictional authority (and implicitly of theory).<sup>289</sup> To this day, active federal judges are generally required to reside within the circuit or district in which they sit,<sup>290</sup> and federal district lines are drawn in relationship to state boundaries. The 1995 Long Range Plan reflects this physical orientation; its aspiration for the federal trial bench is that:

the primary trial forum for disputes committed to federal jurisdiction should be a generalist district court whose judges are *affiliated with, and required to reside in, the general geographic region* served by the court, and whose facilities are reasonably accessible to litigants, jurors, witnesses and other participants in the judicial process.<sup>291</sup>

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requires that a non-corporate felony defendant be present at arraignment and at every stage of the proceedings, subject to waiver. *See Crosby v. United States*, 113 S. Ct. 748 (1993) (absconding prior to the beginning of trial precludes trial under the Rule). If a defendant absconds during trial, it may continue, and if a defendant leaves the country while an appeal is pending, an appellate court may dismiss that appeal. *Ortega-Rodriguez v. United States*, 113 S. Ct. 1199 (1993).

288. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (abduction of a criminal defendant, even from countries with which the United States has extradition treaties, does not prevent that defendant's trial). The court in *Alvarez-Machain* relied on what has become termed the "Ker-Frisbie" doctrine. *Ker v. Illinois*, 119 U.S. 436 (1886) (State of Illinois had defendant abducted from Peru); *Frisbie v. Collins*, 342 U.S. 519 (1952) (Michigan officials kidnapping defendant from Chicago).

289. As Lea Brilmayer describes it: "government coercion is mediated by reference to *land*." *See* LEA BRILMAYER, *JUSTIFYING INTERNATIONAL ACTS* 52-78 (1989) (emphasis in the original); *see also* Friedman, *supra* note 196, at 1442-53 (predicting that globalization will require reconsidering domestic federalism, including the forms of regulating business and industry).

290. *See* 28 U.S.C. § 44(c) (1994) (except for the D.C. Circuit, each circuit judge "shall be a resident of the circuit for which appointed at the time of his appointment and thereafter while in active service"); 28 U.S.C. § 134(b) (1994) (except again for the District of Columbia, each district judge "shall reside in the district . . . for which he is appointed"). These provisions stem from the First Judiciary Act of 1789, ch. 20, § 3, 1 Stat. 73. Once holding a life tenured judgeship, that individual may be temporarily reassigned to sit elsewhere. 28 U.S.C. §§ 291 (circuit judges), 292 (district judges) (1994).

291. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 47 (Recommendation 25) (emphasis added); Action Notice, *supra* note 26 (Recommendation 25 deferred); 1994 DRAFT

While jurisdictional theory still relies on physical nexus, political theory about the United States and the relationship between state and federal governments has turned away from the idea of land and geography as central. To describe the relationships among state and federal governments, contemporary commentators sometimes rely on metaphors like a "marble cake"<sup>292</sup> or a bowl of "mush."<sup>293</sup> We who think about courts will need to reassess assumptions — both of structure and of process — heretofore deeply rooted in the physical relationship of human beings on a specific piece of soil to a particular courthouse.

In practice, technology has and could further disengage courts from dependence on the physical presence of individuals. Today it is telephone conferences in lieu of court appearances.<sup>294</sup> Tomorrow it will be video teleconferencing and the internet. Today, claimants and lawyers from across the country in the Silicone Breast Implant Litigation can address questions to the claims facility in Texas and receive information about the litigation via a computer,<sup>295</sup> and LEXIS-NEXIS has developed a "complex litigation automated docket system" ("CLAD") by which documents can be filed electronically and decisions posted.<sup>296</sup>

Given cyberspace and globalization, the coherence of physicality as the basis of jurisdiction diminishes, with variation depending on the context.<sup>297</sup> Within the confines of my topic here, this point translates

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LONG RANGE PLAN, *supra* note 15, at 39 (Recommendation 23, similar).

292. GRODZINS, *supra* note 2, at 8.

293. Rubin & Feeley, *supra* note 245, at 933.

294. FED. R. CIV. P. 16(b) (providing for pretrial conferences in person or "by . . . telephone, mail, or other suitable means").

295. The Plaintiffs' Liaison Counsel created a Breast Implant Bulletin Board System, enabling access by modem to obtain information, including finding posted notices about the progress of the litigation and dates of hearings; in addition, the Claims Facility has also established a Bulletin Board for claimants. Telephone interview with Richard Rosenthal, Plaintiffs' Liaison Counsel (July 6, 1995).

296. Telephone interview with Richard Klein of LEXIS-NEXIS (June 14, 1995) (describing systems used by the Delaware Superior Court for its asbestos litigation and in a multi-party insurance case; as well as by the Fulton County Court System, Georgia; the Southern District of New York's Bankruptcy Court in a bankruptcy proceeding; and in the Eastern District of Ohio for a product liability action).

297. An area of law much taken with how to assess the effects of technology on legal

into yet another reason why federal and state judicial boundaries are and will become increasingly difficult to justify on lines other than one's normative aspirations for a group of government-empowered adjudicators.<sup>298</sup>

## VI. DEFINITION BY CONTRAST

Is there anything quintessentially different about the federal courts as contrasted to other court systems within the United States? Federal court caseload has long been an eclectic mix, not limited only to disputes readily recognized as "federal" by commentators a generation earlier or later.<sup>299</sup> Much of federal jurisdiction is concurrent with that of the state courts and has been since the inception of the country. Federal courts are no longer populated exclusively by life tenured judges, which might have been a mark of distinction from most other court systems. The modes of decision making within federal courts are also not unique. The amalgam of management, settlement, and

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doctrine is choice of law; like jurisdiction, reliance on a physical nexus — the place of the event — solves fewer problems when participants in the event(s) are far flung and injuries occur across not only physical boundaries but also electronic transmissions.

298. I question not the longevity of state boundaries but their normative implications. Hence, I part company with Briffault who argues that even "the modern tendency to define rights nationally, high levels of interstate mobility, the emergence of new-non-state-based interests" will not undermine the centrality of states. Briffault, *supra* note 200, at 1346. Note also the contrast between Briffault and Kramer. Kramer, *Understanding Federalism*, *supra* note 199, at 1522-46 (arguing that key contemporary elements of state power stem from the role of national media in an era of weak national political parties, the relationships among national and state-elected officials, and federal laws relying on states for administrative purposes); see also Susan Rose-Ackerman, *Environmental Policy and Federal Structure: A Comparison of the United States and Germany*, 47 VAND. L. REV. 1587, 1591-97 (1994) (discussing how even "local" problems such as noise and waste disposal can be inefficiently and inefficaciously decentralized).

299. A related point is nicely made in the exchange between Justice Scalia and Marc Galanter — that contemporary assumptions about "federal cases" do not reflect the full federal docket. Justice Scalia argued in a speech that, in 1960 when he had gone to law school, the docket of the federal courts was populated by important cases, with a touch of the "routine." Galanter reviewed the docket of those "good old days," and demonstrated that a good many "routine" cases were on the docket then as now, but were not the subject of law school discussions. Galanter, *Federal Courts Since the Good Old Days*, *supra* note 213, at 921-28. See also Resnik, *Housekeeping*, *supra* note 3 (discussing valuation of tasks of federal trial judges); Little, *supra* note 13, at 1035-36 (discussing longstanding federal criminal jurisdiction over crimes that might also be prosecuted in state courts).

adjudication, of published and unpublished decisions, is shared by state and federal judiciaries. While federal jurisdictional boundaries have been and are more limited than that of state courts, limited mandates themselves do not delineate federal courts from other adjudicatory institutions; federal agency courts also are courts of limited jurisdiction. Yet the impulse of federal judges to mark distinction remains strong. In large measure, the Long Range Plan defines the federal courts by striving to maintain the contrast between state courts, federal agency courts, and the life tenured judiciary.

One distinction that shapes that difference is that the federal courts today are richer, in material and symbolic terms, than their counterparts.<sup>300</sup> This relative richness comes in several forms, such as judicial salaries,<sup>301</sup> the ratio of judges to cases,<sup>302</sup> the quality of

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300. See also Little, *supra* note 13, at 1055-61 (discussing the "dignitary concerns" of federal judges, and commenting that the 1994 Draft Proposed Long Range Plan included "unanalyzed excesses" in terms of making claims about the superiority of the federal courts, and that his discussion may be more "blunt" than others in describing federal judicial criticisms of certain kinds of crime as based on the view that certain crimes are "too trivial and therefore beneath the federal courts' attention"); YACKLE, *supra* note 174, at 46-49 (describing what he terms "snob appeal" and arguing not to "depreciate the coin that is the federal judiciary," but that "modestly increasing" its ranks would not undermine substantially its "elite" status); Frank Statement, *supra* note 35, at 4-5 ("prestige read as rarity may have to yield to prestige based on accomplishment;" to maintain the very small size of the federal judiciary is to sustain "a glorification of prestige at the price of sound social policy").

301. Insofar as legal research reveals, no one compendium provides historical review of the respective salaries of state and federal judges. Both the National Center for State Courts ("NCSC") and federal statutes provide data on salaries. Beginning in 1975, the NCSC has published surveys of salaries annually. See NCSC, *NCSC Completes New Survey of Judicial Salaries*, 1 STATE COURT REPORT 1 (Issue 2, Winter, 1995) (also discussing plans to publish data on trends) [hereinafter *NCSC 1994 Salary Survey*]. Further, a few studies provide information on salaries at particular moments in time. See, e.g., *Judicial Salaries and Retirement Plans in the United States*, 54 AM. JUDICATURE 184 (1970) (reviewing all the state salaries, describing pay as generally "inadequate" and comparing salaries of highest court judges to other state officials); COMMITTEE ON STATE JUDICIAL SALARIES, A HANDBOOK ON STATE JUDICIAL SALARIES (ABA, Judicial Administration Division, June 1986) (again discussing "inadequate salaries" and calling for reform, surveying salaries of judges and some court employees in all the states and providing comparative data).

To trace the salaries of each bench, we are looking at federal statutes and specific states at specific intervals. However, relevant intervals — i.e., when courts are created and salaries set — do not match easily across systems; further, our library holdings do not include all the relevant historical sources. Hence, it is difficult to obtain matched information, that is, in some years we have data on one system but not another. Rather than



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reviewing all states, we are looking at Massachusetts, New York, and Virginia (former colonies), as well as Michigan, Illinois, and California (major industrial states), and Mississippi, Arkansas, and Wyoming (less industrial and regionally diverse). Further, because intermediate appellate courts were added at different times in the various jurisdictions, we are surveying only data from trial courts of general jurisdiction and from the highest courts in the state or federal systems.

In terms of the 18th and 19th century, a preliminary review reveals an uneven pattern of differences between state and federal salaries. While federal judges were paid more than Massachusetts judges, at some points California judges were paid more than federal judges. In 1789, United States Supreme Court associate justices were paid \$3,500 (Act of Sept. 23, 1789, ch. 18, 1 Stat. 72 (1789)), while justices from the highest court of Massachusetts made \$1,500 in 1789 (1789 Mass. Acts ch. 44). Twenty years later, the Supreme Court of Massachusetts' justices were paid an additional \$600 (1809 Mass. Acts ch. 13). Congress raised the associate justices salaries in 1819 to \$4,500 (Act of Feb. 20, 1819, ch. 27, 3 Stat. 484), and then in 1867 to \$6,000 (Act of March 2, 1867, ch. 166, 14 Stat. 455). Massachusetts raised its Supreme Court justices' salaries in 1843 to \$2,500 (1843 Mass. Acts ch. 9), in 1856 to \$4,000 (1856 Mass. Acts ch. 10), and then in 1866 to \$5,000 (1866 Mass. Acts ch. 46). In 1857, Michigan, which became a state in 1837, paid its associate justices \$2,500 (1857 Mich. Pub. Acts no. 146 § 14), raised in 1887 to \$5,000 (1887 Mich. Pub. Acts no. 96). In 1850, California paid their justices \$10,000 (1850 Cal. Stat. ch. 25), later reduced to \$8,000 in 1852 (1852 Cal. Stat. ch. 10).

Turning to the twentieth century, Congress raised associate justices salaries to \$14,500 in 1911 (Act of Mar. 3, 1911, ch. 231, 36 Stat. 1152), to \$20,000 in 1926 (Act of Dec. 13, 1926, ch. 6, 44 Stat. 919), to \$25,000 in 1946 (Act of July 31, 1946, ch. 704, 60 Stat. 716), to \$39,500 in 1964 (Act of Aug. 14, 1964, Pub. L. No. 88-426, § 403(a), 78 Stat. 434), to \$60,000 in 1969 (Salary recommendations for 1969 increases, 34 Fed. Reg. 2241 (Jan. 15, 1969)), to \$63,000 in 1975 (Act of Aug. 9, 1975, Pub. L. No. 94-82, § 205(b)(1), 89 Stat. 422), to \$72,000 in 1977 (Salary Recommendations for 1977 increase, 42 Fed. Reg. 10297 (Jan. 17, 1977)). Between 1978 and 1994, the justices' salaries were increased many times, to the current level of \$164,100 (28 U.S.C. § 5 (1994), Exec. Order No. 12,944, 60 Fed. Reg. 309 (1994)). Massachusetts' associate justice salaries over the same period ranged from \$10,500 to \$95,808 (1911 Mass. Acts ch. 743; *NCSC 1994 Salary Survey* at 6). Michigan's associate justices were paid \$7,000 in 1913 (1913 Mich. Pub. Acts no. 103) and in 1994 \$111,941 (*NCSC 1994 Salary Survey* at 6). California's justices had a base pay in 1911 of \$8,000 (1905 Cal. Stat. ch. 249, note no pay raise from 1905 until approximately 1919), and by 1994 of \$131,085 (*NCSC 1994 Salary Survey* at 4).

As of 1994, federal judges in general are paid more than state court judges. The NCSC survey reports that associate justices of the states' highest courts were paid a low of \$64,452 and a high of \$131,085; at the trial level the range was between \$61,740 and \$113,000. *NCSC 1994 Salary Survey* at 1. Thus, one can see that currently, federal life tenured judges are paid more than their state counterparts (associate justices paid \$164,100, district judges paid \$133,600). Congress has also mandated that the District of Columbia's local court's trial level judges are paid the same — that is \$133,600. *Id.* at 8. Of course, not all compensation is represented in direct pay; retirement benefits and other kinds of remuneration may make disparities less or more between the two systems. *See* *Judicial Retirement and Pension Plans* (Am. Judicature Soc'y, 1961); 28 U.S.C. § 372 (1994).

courtroom space and its comfort,<sup>303</sup> the public resources spent,<sup>304</sup> the status of the lawyers and litigants who appear in the courts,<sup>305</sup> the

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Further, some states have had to cut back or eliminate budgets for items like judicial travel and other forms of support. See *SAVING OUR SYSTEM*, *supra* note 51, at LXV (1993) (describing as one of South Carolina's "crisis points" that "[f]unding cuts to the courts have resulted in the slashing of operating expenses, including judicial travel").

Another measure of wealth are the support staffs available to each judge. See Neuborne, *supra* note 174, at 1122-24 (federal district judges have the support of law clerks, "chosen from among the most promising recent law school graduates" as well as a smaller docket than do state trial judges, who may either lack technical support or have long term staff assistance; Neuborne argues that such "technical competence" of federal judges, coupled with other factors, make the federal courts a venue of preference for civil rights litigators).

302. Caseload volume is an important aspect of the experience of judges. Comparable data are available for 1993. As of that year, the 789 California trial judges of general jurisdiction had an average of 1,108 filings apiece; the 362 Ohio trial judges had an average of 1,282 filings; the 17 Wyoming judges had an average of 817 filings; and the 372 New Jersey judges had an average of 2,836 filings. NCSC ANNUAL REPORT, EXAMINING THE WORK OF STATE COURTS, 1993: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 7-8 (1995) (filings include what are termed "civil, domestic, and criminal"). In contrast, the national average for the 649 "authorized" federal district judges for 1993 was 426 filings per judge; note further that this average does not include the working contributions of either the 242 district judges who have senior status or the 369 full-time magistrate judges. ANNUAL REPORT OF THE DIRECTOR, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 7 (Table 5), 11 (Table 8) (1993).

303. Compare Randy Gragg, *Monuments to a Crime-Fearing Age*, N.Y. TIMES MAG., May 28, 1995, at 36 (describing the "largest public-building construction campaign since the New Deal," spending "\$10 billion" to build more than 50 new federal court houses and to alter 60 other buildings, and employing "some of the country's best-known architects") with William Glaberson, *Mini-Courtrooms Aid Crowded Dockets*, N.Y. TIMES, Apr. 2, 1990, at B1 (describing courtrooms so small judges need not tell lawyers "to approach the bench," the smaller courtrooms made to respond to caseload crises; the lack of funds for new court construction; and the removal of a "marble information booth" in the lobby of one court house to make room for the "1,500 or so people who often wait outside in the morning to get in"); Jan Hoffman, *Chaos Presides in New York Housing Courts*, N.Y. TIMES, Dec. 28, 1994, at A1 ("one court was so tiny it scarcely accommodated six bodies"). See also *SAVING OUR SYSTEM*, *supra* note 51, at XIII, XLVII, LIII (unsafe and/or inadequate courtroom facilities in specific states).

304. See James S. Kakalik & Abby Eisenstat Robyn, *Costs of the Civil Justice System* XV (1982) (providing comparative "government expenditures for tort cases filed" for trial courts in California, Florida, the State of Washington, and the federal district courts; average expenditures by the federal system for jury trials and per case were "substantially higher" than in state courts).

305. Bryant Garth, *Privatization and the New Market for Disputes: A Framework for Analysis and a Preliminary Assessment*, 12B STUD. IN LAW, POL'Y & SOC'Y 373, 374-75 (1992) (analyzing courts' "competition for desirable business," and that resources of litigants,

kind of cases on the federal docket,<sup>306</sup> and the stature accorded to those who hold the position of federal judge. Consider the words of one federal judge, rejecting the accusation that he seeks to maintain federal court privilege for reasons of prestige. He countered that his goals for the federal judiciary are founded on the need for

an institution of special distinction — staffed by judges of uniformly high quality, functioning in an environment appropriate to the sensitive task of adjudicating issues of constitutional and federal statutory law.<sup>307</sup>

To borrow again from feminist theory, standpoint theorist Nancy Hartsock insists (à la Marx) that one's "standpoint" is not simply an artifact of social position or gender but is an achieved stance, created through self-conscious understanding, self-conception, and identification.<sup>308</sup> Many federal judges and academics have achieved such a standpoint, an understanding of Article III judges as a group constituted with a claim of identity and a need for preservation. For some, the argument for preservation of such an elite is based on the

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scope of case, and financial stakes affect the desirability of cases).

306. Ann Althouse argues that federal court "deference" to state court interests is also founded in federal judicial self-interest; in "making jurisdictional doctrine, the federal courts are, after all, designing their own workload." Althouse, *supra* note 246, at 1207 (arguing that the basis for declining jurisdiction in "domestic relations" diversity cases is the "sense that this work is insignificant docket-clutter beneath the dignity of the federal judge. State judges receive this work not because of respect for integrity of the state's judicial system, but because federal judges have turned up their noses at it").

307. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, *supra* note 68, at 194 (also appreciating and not wishing to "disparage" the "hard-working, talented" judges of the state courts, but arguing that federal courts need be "distinctive"). As noted above, the writers of the Proposed Long Range Plan also argued that federal courts have a "unique mission [which] requires a commitment to conserving the federal courts as a distinctive judicial forum." 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 6; 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 4 (same). To keep the numbers of judges small within the federal courts, Judge Newman has proposed what he terms a system of "discretionary access," by which federal judges would decide "whether a particular case within federal jurisdiction ought to be litigated in federal or state court." Jon O. Newman, *Determining the Proper Allocation of Cases Between Federal and State Courts*, 79 JUDICATURE 6, 6 (1995); Newman Statement, *supra* note 27.

308. Hartsock, *supra* note 59, at 160 (explaining that the "concept of a standpoint depends on the assumption that epistemology grows in a complex and contradictory way from material life.").

view that the federal judiciary's privileged status has served the country well. Others argue that such distinctions serve only some segments of the country well.<sup>309</sup> The issue is whether an enclave of privilege has the potential to serve a range of interests such that it is in the interest of all to support some form of unique status for the federal judiciary.<sup>310</sup>

## VII. TIME FOR INVENTION, AGAIN

Once freed from undue reliance on historical claims about the jurisdiction of the federal courts, and yet appreciative of the historical stature of federal courts stemming in good measure from its relative wealth, we can, I hope, move on — toward a new century, and perhaps new options. I find disheartening recommendations for shifting jurisdiction from one burdened institution to another, and specifically proposals that move cases from the federal to the state courts and to federal agencies, institutions more beleaguered and less well-resourced than are the federal courts.

Rather than engage in or prompt jockeying with other judges about relative deprivations, federal judges should appreciate that they — like

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309. According to John Frank, the constitutional decision to create diversity jurisdiction was a product of desires "to permit commercial, manufacturing and speculative interests to litigate their controversies, and particularly their controversies with other classes, before judges who would be firmly tied to their own interests," and "to achieve more efficient administration of justice for the classes thus benefitted." Frank, *Historical Bases for Federal Judicial System*, *supra* note 189, at 28 (footnote omitted); *see also* Forrester, *supra* note 190, at 119 (discussing the search for judges who, in words of Prof. Forrester, had "federal sympathies"); ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975) (discussing federal judicial enforcement in the nineteenth century of fugitive slave laws, as contrasted with some state judiciaries that found slavery morally abhorrent and hence unconstitutional); EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA 1870-1958* at 22-27 (1992) (explaining how federal diversity jurisdiction worked to the benefit of national corporations).

310. John Frank has tied together the question of a generative federal judiciary with the composition of its caseload. He asked: "Are the federal courts a desirable institution for a sound social order if they are restricted to 'society's most contentious and most important issues' and achieve that restriction by over-loading already over-loaded state courts and dumping people and commercial business problems out of the system?" Frank Statement, *supra* note 35, at 8. Given his reading of current proposals to restrict federal jurisdiction, his question also requires exploration of which issues become understood as "important."

other judges in the United States — are specially situated. As the Long Range Plan itself reflects,<sup>311</sup> members of the federal judiciary share with their sibling judges in federal agencies and in state courts both the problems of the delivery of justice and a deeper understanding of the harms done by its failures. Moreover, judges appreciate these problems more than do most other members of government. Federal and state judges could thus join together to invent new means of responding to the citizenry's need for judgment.

#### *A. National Courts for Interstate Cases*

Reflecting on the current crop of proposals, the descriptive changes that have occurred within the federal system, and political scientists' observations on the many modes of joint and collaborative governance within the United States has led me to consider alternative visions for the coming century. Given that technology has radically altered interactive possibilities,<sup>312</sup> I here suggest one possible invention to help move the conversation from its reliance on the current set of options (either state or federal court, court or agency) to imagine something else.

The narrative of the federal judicial system I prefer to tell is a history of invention with a good deal of creativity, some quiet and some exuberant. Take magistrate judges, who accrued power slowly

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311. See 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 22-23 ("it is unfair to solve the future caseload burdens of the federal courts by foisting them off onto the states"); *id.* at 36-37 (Recommendation 14; calling for Congress, when considering shifting jurisdiction away from the federal courts, to address both the impact on the states and to provide financial assistance); Action Notice, *supra* note 26 (Recommendation 14 deferred). The earlier draft of the Long Range Plan had a recommendation parallel to Recommendation 14, but did not include the discussion of the unfairness of solving federal caseload burdens by further burdening the states. 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 31 (Recommendation 13).

312. Technology has also caused many problems for the federal courts. For example, one way to understand the difficulty that pretrial discovery rights have posed is to recall that those rules were drafted in the 1930s, before photocopiers became commonplace. What injuries photocopies have inflicted, computer data-basing and scanning may well resolve. Current (and future) means of amassing and locating information are critical to the courts of the twenty-first century, and may well help to solve many of the problems pressing us at the close of this century.

over a period of thirty years, not even gaining the title "judge" until 1990.<sup>313</sup> The emergence of the fourth tier of federal judges need not be relegated to an embarrassed footnote but rather seen as an innovative mechanism almost to double the size of the federal trial bench during decades when a variety of political obstacles made unfeasible the expansion of the life tenured apparatus. Consider also the growth of agency adjudication, with its trumpeted beginnings (the New Dealers praised this cadre of what today we call bureaucrats and hoped that their regulatory efforts would benefit the country<sup>314</sup>), its more quiet expansion during the 1950s and 1960s,<sup>315</sup> its siege of criticism

313. See Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, § 321, 104 Stat. 5089, 5117 (1990), codified at 28 U.S.C. § 631 note (1994) (change of name of United States magistrate to "United States Magistrate Judge").

314. The aspirations for regulatory agencies are illustrated by the response to the Supreme Court decision in *Crowell v. Benson*, discussed *supra* note 75. See John Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact"*, 80 U. PA. L. REV. 1055, 1082 (1932) (concluding that allowing trial de novo after administrative hearings "would make the establishment of an effective system of administrative regulation by the Federal government well-nigh impossible"); see also Comment, *Judicial Review of Administrative Findings—Crowell v. Benson*, 41 YALE L.J. 1037, 1047-48, 1053 (1932) ("*Crowell v. Benson* injects into the administration of the . . . Act inconvenience and confusion which will materially obstruct attainment of its ends . . . . Injured workmen will be subjected to a great deal of litigation . . . . And herein lies the greatest significance of the case; the harm for which it will be remembered."). For discussion of other animating bases for agency expansion, see STEPHEN SKOWRONKEN, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877-1920* (1982) (analyzing the relationships among industrialization, nationalization, and administrative institutions).

315. The number of administrative law judges grew from the 1950s onward. For example, the Social Security system developed slowly from its inception in 1935 to 1950. In 1950, only 16 percent of those people over age 65 received social security benefits. Robert M. Ball, *The Original Understanding on Social Security: Implications for Later Developments*, in SOCIAL SECURITY: BEYOND THE RHETORIC OF CRISIS 17, 27 (Theodore R. Marmor & Jerry L. Mashaw eds., 1988). The hearings and appeals system for the programs in existence until the mid-1950s (old-age and survivors insurance) "protected well-defined rights and protect[ed] against administrative error" on issues such as eligibility based on age, retirement, or marital status. Edward D. Berkowitz, *Disability Insurance and the Social Security Tradition*, in SOCIAL SECURITY: THE FIRST HALF-CENTURY, 292-93 (Gerald D. Nash, Noel H. Pugh & Richard F. Thommasson eds., 1988).

The number of administrative law judges grew from the 1950s onward, from 30 in 1956 to 110 in 1960 to more than 800 in 1988. *Id.* By 1975, disability appeals before administrative law judges numbered some 150,000 per year. By 1983, the number of such appeals was 364,000. Jerry L. Mashaw, *Disability Insurance in an Age of Retrenchment: The*

resulting in the “due process revolution,”<sup>316</sup> during which procedural obligations were imposed on agency adjudication and by which agencies came all the more to resemble courts.

The more recent developments, of judicial federalism, large-scale litigation, and fluid borders, could in turn prompt yet another round of innovations — aspiring to create more judicial services with stature and wealth rather than to shift crumbling pieces of pie about. One such proposal is to call for a set of what I term “national courts,” either created by the states<sup>317</sup> or by Congress pursuant to its interstate commerce powers, and staffed primarily by state, not federal, judges.

Why another set of courts? Why national courts? Because of the many instances in which contemporary litigation involves disputes that cut across several states. Prime examples include the aggregated cases described above, such as air crashes and asbestos injuries, in which the underlying rules of tort law are currently made by the states, and typically filed both in state and/or federal courts.

Federal courts have become a place for aggregation because many of these litigations transcend the boundaries of individual states,<sup>318</sup>

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*Politics of Implementing Rights*, in BEYOND THE RHETORIC OF CRISIS 166. As of 1991, requests for a hearing before an administrative law judge numbered 327,000. Robert S. Haberman & David G. Hatfield, *The Role of the Appeals Council in the Administrative Adjudicative Process: Unveiling the Mystery*, 39 FED. BAR NEWS & J. 444, 447 (1992). For more history of the Social Security system, see JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983).

316. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (requiring a hearing prior to the termination of welfare benefits).

317. If done by interstate compacts, this constitutional route sometimes requires the consent of Congress. *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 459-60, 471 (1978) (rejecting literal reading of the Clause and applying functional test under which agreements that do not “encroach” on federal power do not require congressional consent while “most multilateral compacts have been submitted for congressional approval, . . . [that] historical practice” was not a requirement that all be). See U.S. CONST., Article I, § 10 (“the Compact Clause”), discussed in Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 691-708 (1925) (detailing compacts related to land and boundaries, navigation, crime, uniform legislation, natural resources, utilities, and taxation) [hereinafter Frankfurter & Landis, *The Compact Clause*]. A narrower view of the reach of the Compact Clause is provided in Abraham C. Weinfeld, *What Did the Framers of the Federal Constitution Mean by “Agreements or Compacts”?*, 3 U. CHI. L. REV. 453 (1935-36).

318. Contemporary rules about the territorial limits of state court jurisdiction make

have no particular connection with any given state, and involve litigants from many parts of the country. Federal courts are also a venue for decision making because, as detailed above, they have more resources with which to respond than do many of the state courts. But these cases are burdensome and time consuming. Moreover, the source of their claim to federal court time is generally that actors from different states are litigants and not (absent the current proposed enactment of national products liability legislation) that federal law should govern the dispute. Given the bases in state law, contemporary proposals for consolidation also include recognition of the important role state judges play in large-scale litigation.<sup>319</sup>

Today, such cases are neither state nor federal.<sup>320</sup> In 1996, the debates about the meaning and values of federalism are too narrowly cast as discussions about governance by either individual states or the national government. Over the course of the century, institutions have developed across the country that recognize the need to cross state lines without becoming instruments of the United States

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litigation of all issues within the confines of a single state difficult and have prompted a variety of suggestions, including alterations of federal jurisdiction to relax diversity requirements to enable centralization in the federal courts. See, e.g., the Multiparty Multiforum Jurisdiction Act of 1993, H.R. 1100, 103d Cong., 1st Sess. (1993); see also 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 29-32 (Recommendation 7; "Diversity jurisdiction should . . . be retained for some consolidated 'mass tort' litigation, which will require a relaxation of the traditional 'complete diversity' requirement, in order to promote effective consolidation of related cases"); Action Notice, *supra* note 26 (Recommendation 7 deferred); 1994 DRAFT PROPOSED LONG RANGE PLAN, *supra* note 4, at 25-26 (Recommendation 6 similar); see generally Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7 (1986).

319. See ALI, COMPLEX LITIGATION, *supra* note 130, at 165-216 (Chapter 4; interstate and interfederal consolidation); NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM TRANSFER OF LITIGATION ACT, *supra* note 130 (inter-state transfers). The differences are analyzed in Edward H. Cooper, *Interstate Consolidation: A Comparison of the ALI Project with the Uniform Transfer of Litigation Act*, 54 LA. L. REV. 897 (1994).

320. In many respects, the suggestion of an interstate court reflects calls from earlier eras on the need for interstate regulatory coordination. See, e.g., Frankfurter & Landis, *The Compact Clause*, *supra* note 317, at 717 (explained state compacts relating to natural resources: "The regional character of electric power, as a social and engineering fact, must find a counterpart in the effort of law to deal with it. No single State in isolation can wholly deal with the problems. . . . Co-ordinated regulation among groups of States, in harmony with the Federal administration, . . . must be the objective").



government.<sup>321</sup> For example, for more than a century, the National Conference of Commissioners on Uniform State Laws has worked in response to the felt need for uniformity across states.<sup>322</sup> Other state-based national organizations include the National Conference of State Legislators, the National Association of Attorneys General, the National League of Cities, the National Governors' Association, and the United States Conference of Mayors,<sup>323</sup> all of which play important roles in shaping national policy.<sup>324</sup> Some have used the phrase "picket fence federalism" to capture existing national connections across states and through tiers of government;<sup>325</sup> others have used the terms "marble cakes"<sup>326</sup> and "matrixes."<sup>327</sup>

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321. Frankfurter & Landis, *The Compact Clause*, *supra* note 317, at 688-90 (including a list of such associations as of that writing).

322. Frankfurter & Landis, *The Compact Clause*, *supra* note 317, at 688 (detailing this effort, beginning in 1890).

323. The National Conference of State Legislatures, founded in 1975, describes its aim as "improving the quality and effectiveness of state legislatures," as well as "to ensure states a strong, cohesive voice in the federal decision-making process" and "to foster interstate communication and cooperation." The National Governors' Association, founded in 1908, describes itself as a "vehicle through which governors influence the development and implementation of national policy." The National Association of Attorneys General, founded in 1907, sponsors national legal education seminars, including on United States Supreme Court practice. The National League of Cities, founded in 1924, is a federation that pursued a "national municipal policy" and "represents municipalities before Congress and federal agencies." The United States Conference of Mayors, founded in 1932, is constituted of mayors of cities with populations of more than 30,000, to promote "cooperation between cities and the federal government." 1 ENCYCLOPEDIA OF ASSOCIATIONS, pt. 1, at 672-73, 693-94 (1995).

324. Kramer, *Understanding Federalism*, *supra* note 199, at 1552-53. Political scientists describe the "Big Seven," constituted by the National Governors Conference, the Council of State Governments, the National Legislative Conference, National Association of County Officials, National League of Cities, U.S. Conference of Mayors, and the International City Management Association. See Wright, *Revenue Sharing*, *supra* note 6, at 111; see also GRODZINS, *supra* note 2 (discussing the cross currents in influence that run national, state, and local).

325. Wright, *Revenue Sharing*, *supra* note 6, at 109-10 (relying on former North Carolina Governor Terry Sanford's metaphor and elaborating on the competition by professionals for funds, jurisdiction, and political support, and analyzing the discrete interests and points of view based on those actors' positions).

326. GRODZINS, *supra* note 2.

327. ELAZER, *supra* note 7, at 37, 200.

While political scientists have appreciated the webs of social structuring that cut across state and federal lines, the legal tradition (in part because of a focus on state and federal jurisdiction) has tended to see but the two alternatives and/or their concurrency.<sup>328</sup> I think that members of both state and federal judiciaries could be teaching us all what they in fact know from first hand experience: that an *interstate* problem is not necessarily a problem for the federal courts to consider alone nor one to be remitted to a single state's judiciary. Instead of the *ad hoc*, erratic integration exemplified by some of the asbestos cases, the breast implant litigation, and Exxon Valdez, federal and state judges could jointly request either that the states launch a compact effort or that Congress create a new set of national courts,<sup>329</sup> to have jurisdiction over those cases involving litigants from several states and arising under state law, and over ordinary diversity cases as well.<sup>330</sup>

This new set of courts could relieve burdens on the federal courts,<sup>331</sup> enabling those courts to maintain a focus on federal

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328. Responding to the "shibboleths 'State-Rights' and 'National Supremacy,'" in 1925, Frankfurter and Landis advocated recognition of regional needs: "Our regions are realities. Political thinking must respond to these realities." Frankfurter & Landis, *The Compact Clause*, *supra* note 317, at 729.

329. Precedent for such requests can be found in the federal judiciary's proposal for congressional assistance to deal with what used to be termed "protracted" litigation out of which grew the Multidistrict Litigation statute. See Resnik, *From "Cases" to "Litigation,"* *supra* note 3, at 29-35.

330. To the extent that abolition of federal diversity litigation is opposed because of the view that state courts will either be biased or are overwhelmed, the provision of national courts would respond to those complaints. To the extent diversity jurisdiction is opposed because of the view that federal judges learn from and should engage in common law contract and tort cases and that the state and federal courts are both well served by a crisscrossing of information, then the removal of "ordinary" diversity cases would be a loss. See Frank, *For Maintaining Diversity Jurisdiction*, *supra* note 39, at 11 (discussing "the educational value of having two systems in interaction"); Frank, *The Case for Diversity Jurisdiction*, *supra* note 39, at 409 (similar discussion).

331. The potential for also using national courts to respond to the so-called "federalization of crime" is not my focus here but if such courts were established, they could become a possible venue for criminal as well as civil cases in which interstate transactions and the need for national coordinated responses dominate. See Beale, *supra* note 13, at 1004-18 (proposing "disaggregation of federal criminal jurisdiction" so that federal crimes may be prosecuted in state court but noting that certain federal crimes may continue to require a specifically federal judicial response); Little, *supra* note 13, at 1085 (concluding that federal courts should continue to exercise federal authority "when states are demonstrably unable or

statutory and constitutional adjudication<sup>332</sup> and could, if supported by congressional funding, relieve burdens on state courts, enabling the individual state systems to concentrate resources on problems perceived to be particular to each state.<sup>333</sup> These national courts could be established in several regions across the country.<sup>334</sup> Technology (such as "filing by fax" and computer-based data accessing) can ease the difficulties of distance. State judges (assisted by congressional financial support for these new, national courts) could rotate in and out of these courts. Of course there are a host of substantive and procedural details to formulate, from the reach and meaning of the law of such courts and their modes of proceedings<sup>335</sup> to the relationship between national courts and the existing courts,<sup>336</sup> and particularly federal bankruptcy

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unwilling to address criminal behavior that has reached some significant proportions.").

332. What my suggestion would not do, as contrasted with some proposals to reshape federal jurisdiction, is to deprive life tenured judges of all cases involving small amounts of money; federal jurisdiction over federal statutory claims would remain, thereby ensuring that federal judges work not only on large-scale or constitutional issues but that their judgments in array of cases are informed by knowledge gained from a general caseload.

333. The creation of such a national court would respond to the concerns of some federal judges, whose workload would be reduced and the mix changed; as long as Congress funds additional judges for states, state court burdens would also not increase and would likely decrease. The current Congress, unfortunately, has not been attentive to the needs to support the state judiciaries; it plans to phase out the State Justice Institute, which has provided grants for coordination among state, tribal, and federal judiciaries, funds experimental programs, convenes conferences, and serves as a clearinghouse for information. See Malcolm M. Lucas, *Don't Pull the Rug Out from under the State Justice Institute*, LEGAL TIMES OF WASH., Sept. 25, 1995 at 21 (arguing that to "dismantle the only federally funded organization dedicated to helping the state courts manage the overwhelming torrent of criminal cases" is terrible).

334. See also Rose-Ackerman, *supra* note 298, at 1622 (discussing the failures of environmental policies that operate too much at either the national or local level and the need for "recognizing the complex regional and interjurisdictional character of air and water pollution").

335. If these courts are analogized to state compact law, then they might be understood as generating a "third and distinct species" of law (David E. Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 VA. L. REV. 987, 1039 (1965)) — rather than being forced into the "mold" of being characterized as either state or federal. See L. Mark Eichorn, *Cuyler v. Adams and the Characterization of Compact Law*, 77 VA. L. REV. 1387, 1411 (1991).

336. When appropriate, Indian tribal courts should also be consulted and mechanisms for cooperation and coordination among the three court systems developed. See *NCCJ Adopts Two Strong Resolutions on Federalism*, 7 STATE-FEDERAL JUDICIAL OBSERVER 1 (Oct. 1994) (National Conference of Chief Justices adopt resolution supporting cooperation and

courts that currently function as a fulcrum between state and federal systems.<sup>337</sup>

National courts would also be responsive to the objections made to taking diversity jurisdiction out of the federal courts — that (in the words of one lawyer who testified before the Long Range Planning Committee) “the problem of local prejudice, particularly in states with electoral judgeship systems, is far more serious than” is currently recognized.<sup>338</sup> National courts need not be populated by local judges but could be staffed by state judges assigned on rotating bases, and perhaps by federal judges. Further, instead of rejecting the “nationalizing role of diversity jurisdiction,”<sup>339</sup> such courts could expand that trend, which stems from the interstate nature of the disputes and is an unsurprising artifact of ready interchange among people in distant locales.<sup>340</sup> Moreover, if national courts had many high

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coordination among state, federal and Tribal courts); TRIBAL COURTS-STATE COURT FORUMS: A HOW TO DO IT GUIDE TO PREVENT AND RESOLVE JURISDICTIONAL DISPUTES BETWEEN TRIBAL AND STATE COURTS (NCSC 1993).

337. Depending on how the courts were created and constructed, one would anticipate legal challenges. For example, if such courts were congressionally created and staffed by state judges, would such a mandate constitute “commandeering” state powers? See Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995). Would such congressional action be an example of “protective jurisdiction” and the creation of causes of action without vesting jurisdiction? See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 460, 469-84 (1957) (Frankfurter, J., dissenting) (assuming that federal common law cannot govern and addressing the issue of whether Congress can confer jurisdiction while not creating the substantive law); Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542 (1983); *Suter v. Artist M.*, 503 U.S. 347 (1991) (the Adoption Assistance and Child Welfare Act of 1980, requiring federal reimbursement to states for certain services, does not create an implied cause of action); *Thompson v. Thompson*, 484 U.S. 174 (1988) (the Parental Kidnapping Prevention Act does not create an implied cause of action).

338. Ayer Statement, *supra* note 48, at 4; Comments of the Bar Association of the District of Columbia Litigation Committee before the Long Range Planning Committee at 2-4 (diversity jurisdiction limits the incentives of special interest groups to attempt to influence state judicial elections) (on file with the author); see also Frank, *For Maintaining Diversity Jurisdiction*, *supra* note 39, at 12.

339. This is Judge Sloviter’s phrase. Sloviter, *Diversity Jurisdiction Through the Lens of Federalism*, *supra* note 39, at 99.

340. Judges could go to Congress with a variety of proposals, many less ambitious than that detailed above, to enhance judicial federalism. For example, judges could request

visibility cases, which while burdensome are also interesting, such a bench could achieve prestige and stature, thus enlarging the country's occasions upon which to provide elite judiciaries.<sup>341</sup>

*B. Dialectical or Dissolving Federalism: On the Gains and Losses*

Let me turn from an illustrative specific proposal to a more general point about federalism. Edward Rubin and Malcolm Feeley have recently argued that the country has evolved from a federation of semi-sovereigns into a national government that relies on the states as centers of de-centralization; in their view, federalism per se has little to commend it.<sup>342</sup> In contrast, Larry Kramer believes that the states are alive and well, with laws affecting the lives of most citizens more than does federal law.<sup>343</sup> Two decades ago, Robert Cover and Alexander Alienkoff spoke of the values of a dialectical federalism, of the dialogue between state and federal systems, of normative utility of maintaining distinctive systems.<sup>344</sup>

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amendment of the Anti-Injunction Act to codify changing understandings of judicial federalism or the enactment of a separate statute to authorize joint federal-state judicial activities. See, e.g., Diane P. Wood, *Fine-Tuning Judicial Federalism: A Proposal for Reform of the Anti-Injunction Act*, 1990 B.Y.U. L. REV. 289. Further, judges need not await congressional action to make plain the changing needs of the judiciary and to craft a future plan to encompass greater cooperation and coordination between state and federal systems.

341. To the extent that state-based agreements evidence significant power, they may bump into Compact Clause doctrine which is leery of state "encroachments" on federal power and into federal judges who are protective of their own jurisdiction over "complex" and desirable cases. See *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 472-79 (1978); Garth, *supra* note 305.

342. Rubin & Feeley, *supra* note 245, at 908-09.

343. Kramer, *Understanding Federalism*, *supra* note 199, at 1504 ("by comparison with other developed nations, it's striking how much authority in this country is still exercised by state law"). Kramer also believed that the principle mechanisms by which state governance flourishes is the structure of political parties in the United States and the federal reliance on decentralized administration, rather than on judicially-enforced state/federal distinctions. *Id.* at 1543-46 ("interdependence of legislation and administration" and critical dependence of federal law on state administration); see also Eskridge & Ferejohn, *supra* note 199, at 1358-59 (arguing that federalism has a problem "of credibility" if it does not seek to maintain a "robust" role for state governance) (emphasis in original).

344. Cover & Alienkoff, *supra* note 252, at 1045-52; 1064-68 (overlapping jurisdiction also useful to enact the tensions in governance and ambivalence about norms); see also Cover, *The Uses of Jurisdictional Redundancy*, *supra* note 252. Compare Professor Meador's

My hope is to move toward a position that embraces something from each of these divergent sources, at times focused on the immense power of the national project, and other times sharing an appreciation for the vitality and durability of forms of governance that, without guns or great resources, continue to have social and political force.<sup>345</sup> Collaborative federalism is the story that some not schooled in law stress, and that approach captures some of the emerging methods of legal practice that cut across state and federal jurisdiction.

My suggestion of yet another set of courts, representing the collectivity of the states, is prompted by interest in exploring opportunities for multiple voices, exchange, and coordination, and by unease with the centralization that accrues so much work and power to a single locale.<sup>346</sup> Deliberate “noncentralization”<sup>347</sup> offers one response. While we have a judicial system that I have described above as a sprawling house, with courts, agencies, and private providers, we have not supported these activities in as generative fashion as might be possible. Currently, agency courts lack a strong written tradition,<sup>348</sup> and private providers are desired in large measure because of their silent, closed processes. The other court systems, state and federal, each feel themselves so engulfed that they are at risk of losing their capacity for deliberate speech. Would another court — charged with articulation — reinvigorate a conversation about norms and constitute a force that counters the power of the federal government and captures the power of states? Just as states exist in part because of the habit of invoking

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suggestion of a unified court system, in Daniel J. Meador, *Transformation of the American Judiciary*, 46 ALA. L. REV. 763, 776-82 (1995) (considering the advantages of a unified state and federal court system and the trends that underlie movement in that direction).

345. Resnik, *Dependent Sovereigns*, *supra* note 3, at 747-58; Resnik, *Rereading “The Federal Courts”*, *supra* note 3, at 1049-51; *see also* AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP* (1995).

346. The specific example here in the context of mass torts is the resolution of hundreds of thousands or millions of claims by a single judge working with a small set of attorneys and appointed experts. *See* SCHUCK, *supra* note 100 (Agent Orange); SOBOL, *supra* note 89 (Dalkon Shield).

347. A term borrowed from ELAZER, *supra* note 7, at 171.

348. *See also* POSNER, *THE FEDERAL COURTS*, *supra* note 23, at 162 (noting the absence of opinion writing by the appellate structure within the Social Security Administration and urging Congress to create a “specialized appellate review” court within the agency).

them as relevant sources of governance,<sup>349</sup> so might we build on practices of co-venturing across states to enable additional effective means of providing adjudicatory resources. Is it worth trying to shape another national institution, one charged with providing adjudicatory services? Here are the imponderables of prediction, coupled with aspirations for more justice, not less.

### VIII. CONCLUSION

The life tenured federal judiciary currently occupies a relatively luxurious space. These judges have both resources and a culture of excellence that they understandably seek to preserve. I write in the hopes that those who consider the shape of “the federal courts” will think not only of its own preservation but of the preservation of judicial resources — by necessary expansion. The conversation about expansion needs, I think, to move beyond the question of what size the life tenured judiciary should be (whatever the size, it will remain minute in a country of more than 250 million people), to consider how judges who lack life tenure can partake of and generate a comparable culture of excellence, a bravado that enables them to sit in judgment of those who empower them, and energy and resources sufficient for the careful consideration of an unending line of complaints.<sup>350</sup>

Judicial interdependence exists between Article III and non-Article III judge, as it does between state and federal judge. All of these judges are under siege; all live precariously in a world impatient with individualized judgment and eager for a sense of enhanced security. The shared project is to increase social appreciation and support for the enterprise of judging, and to help all who hold the power to judge to

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349. Briffault, *supra* note 200, at 1346-47 (discussing how a “complex of values . . . gives the states a certain importance in the popular consciousness that reinforce their political position”).

350. As Ellen Peters, Chief Justice of the Supreme Court of Connecticut explained: “Unless courts themselves self-consciously take on the role of principal players in the nation’s management of its adjudicatory resources, others will take over the planning for us. That is a default position that neither the courts of this country, nor the people whom we serve, can afford.” Ellen A. Peters, *State-Federal Judicial Relationships: A Report from the Trenches*, 78 VA. L. REV. 1887, 1893 (1992).

exercise it thoughtfully and wisely. The true nightmare “scenarios”<sup>351</sup> are when litigants in search of justice find insufficient numbers of any judges able to respond and when we live in a society indifferent to hearing either litigants or judges.

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351. 1995 PROPOSED LONG RANGE PLAN, *supra* note 4, at 18-19.